

**Muslim women who veil and Article 9 of the European
Convention on Human Rights: A socio-legal critique**

by

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STUDENT DECLARATION FORM

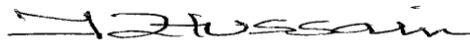
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Abstract

Islamic veiling has been the subject of many theological, social and legal debates, which are fluid and their intensity has been further influenced by its contextualised meanings such as religiosity, modesty, identity, resistance, protest, choice and subjugation. Literature on Muslim veiling has either examined its treatment by legal or socio-feminist perspectives, whereas this thesis critiques the religious, socio-feministic and the legal discourses. The contemporary discourse is dominated by competing binaries that label it as a tool of oppression or one of empowerment. Many of the assertions are based not on the veil's multiple meanings or the wearer's true motivations but on misplaced assumptions of moral authority by those who oppose or defend the practice, as well as native informants professing to represent veiled Muslim women, leaving Muslim veiled women's voices muted. Having examined the religious imperative that has a patriarchal basis, the thesis constructs a critique of the two dominant discourses central to the contemporary debates on veiling. One discourse defends the practice as empowering whilst the other calls for prohibitions on the practice using liberation from oppression as a justification, particularly with issues surrounding the wearing of the full face veil. This is followed by a critique of the key cases generated under Article 9 ECHR, which attempts to balance the religious rights of those who veil with the rights of others. The case law highlights that the ECtHR not only falls short in disclosing satisfactorily how it has struck a balance between these competing rights, but also fails to adopt a neutral stance to religious expression through symbols, its reasoning being based on contradictory stereotypes of Muslim women as passive and victims of gender oppression in need of liberation. The influence of such stereotypes and an inadequate application of the margin of appreciation doctrine have led the ECtHR in validating state prohibitions on the hijab and the full face veil, thereby failing to acknowledge the voices of the veiled women at the centre of a human rights claim, delivering a further blow to them. Post the case of *S.A.S. v. France* the ECtHR has exasperated this even further by allowing an abstract principle of 'living together' as a justification for the full face veil's prohibition in public spaces, resulting in Article 9 rights of Muslim women who veil being endangered even further by the introduction of such an open-ended ground.

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INTRODUCTION

No other form of head dress has stirred up as much controversy as the Islamic veil. To a non-Muslim it may appear to be just another piece of cloth but to a Muslim woman that piece of cloth is loaded with multiple meanings such as religiosity, modesty, piety, honour, seclusion, resistance, political protest, expression of choice and a means of negotiating entry into public space. Lazreg refers to the power of the veil over the minds of men and women as 'so blinding as to be deadly' and narrates an example of a report by the Saudi media in March 2002 where fifteen school girls died in a fire in a school in Mecca because the vice police¹ stopped fire fighters from approaching the girls as they were not wearing the prescribed religious dress, hence it was deemed to be sinful for the firemen to see the girls without their veils.²

Lazreg observes the force of the veil as 'such is the power of the veil that it captures the imagination, frustrates, coerces, inspires, and disempowers'.³ Her reference to the power of the veil does not refer to the piece of cloth, but the force of religious prescription that some are willing to follow so blindly, even if it means a lack of choice or death. Some may find that it brings them closer to God, whilst for others it is a state enforced duty, even if that means that it brings death to the woman. No other religious symbol has raised such reactions to non-compliance. Borneman describes the veil as signifying 'unbreachable differences between the West and Islam, achieving the status of an icon similar to the Christian Cross or the national flag'. He further opines that it is 'most closely identified with the issue of women's status in a politicized Islam'.⁴ In Shiraz's opinion 'to delimit the meanings of the veil is indeed a challenging if not an impossible task'.⁵ Hence Taylor's desire to have the hijab thought of as 'just a scrap of cloth' is a suggestion that could be considered a deprivation of the different meanings of the veil and possibly being considered an affront to those who veil.⁶ It is not the piece of cloth but the symbolism associated with it that is at stake for those who wear it, with the piece of cloth being the transmitter of the desired meaning. Such is the power of the veil on those who adopt it and those who oppose it. This clearly indicates that it is more than just a piece of cloth and sentiments and reactions including fatal ones related to the veil have

¹ In Saudi Arabia the hijab is compulsory under law for all women

² Marnia Lazreg, *Questioning the Veil: Open letters to Muslim Women* (Princeton University Press 2009) 5

³ Ibid 6

⁴ John Borneman, 'Veiling and Women's Intelligibility' (2009) 30:6 *Cardozo Law Review* 2745 <<http://cardozolawreview.com/Joomla1.5/content/30-6/BORNEMAN.30-6.pdf>> accessed 3 July 2012

⁵ Faegheh Shirazi, *The Veil Unveiled: The Hijab in Modern Culture* (University Press of Florida 2003) 175

⁶ Pamela K Taylor, 'I just Want to be Me: Issues in Identity for One American Muslim Woman' in Jennifer Heath (ed), *The Veil: Women Writers on Its History, Lore, and Politics* (California University Press 2008) 128

surfaced in not only Muslim but European states too. Veiling has invoked solidarity and protests throughout the Western world; it has attracted extreme comments from the local to the political and even led to a fatal stabbing of a veiled Muslim woman in a courtroom in Dresden, Germany in 2009.⁷ However, in both examples the resultant loss for being unveiled and veiled has been borne by a woman.

The power of the veil has not been confined to a singular feature; its multiple and variable meanings have been attributed to religious fundamentalism, human rights violations, and even terrorism.⁸ Its utility and the obsession with it has led it to be used as a marketing tool advertising consumer products, featured in cinema, played a part in erotica, been the subject of literary works, been militarised, politicised and featured in fashion shows. Hussein Chalayan a reputed fashion designer showed his provocative collection in spring/summer 1998 which Blanchard described:

The show ended with a line-up of six models. The first wore a chador, which covered most of her body and allowed a gap just for her eyes. Each veil became shorter and shorter until, finally, the last one was nude apart from a mask covering her face. 'It was about defining your cultural territory,' he says. 'How a group of people define their territory with their clothes. The covering of the body was also representative of death, the veil bringing the body to a mummy-like state. It is a deathly state. You're pretending you don't exist. By becoming an anonymous person, you are creating your own territory. It was such a powerful show - so moving for me.'⁹

The debates on veiling are controversial, multi-faceted and are consistently increasing in intensity and diversity. It is not possible to examine every perspective on veiling as that would

⁷ Daily Mail Reporter, 'German accused of stabbing pregnant Muslim woman to death inside a courtroom goes on trial' *Mail Online* (27 October 2009) <<http://www.dailymail.co.uk/news/article-1223018/Man-accused-stabbing-pregnant-Muslim-woman-death-inside-German-court-goes-trial-tight-security.html>> accessed 20 October 2010

⁸ Philip J. Rosenbaum, 'The Role of Projective Identification in Construction of the "Other": Why do Westerners want to "Liberate" Muslim Women?' (2013) 19 *Culture & Psychology* 213, 214

⁹ Tamsin Blanchard, 'Mind Over Material' *The Guardian* (24 September 2000) <<http://www.theguardian.com/theobserver/2000/sep/24/features.magazine37>> accessed 4 September 2013

be outside the parameters of this thesis, as there are eleven different frames with each frame containing further sub-frames that are associated with veiling.¹⁰

Aims of the thesis

The wearing of hijab and the Muslim veil has generated a vast amount of literature examining the practice from different perspectives. The aim of this thesis is not to incorporate every perspective but to focus on the discourses that have dominated the debate on these forms of religious clothing. The perspectives examined include wearing of the veil or hijab as a religious obligation associated with modesty, as a tool of oppression, as a means of empowerment and as a European human right. The existing literature on veiling and hijab examines the practice from either a sociological or a legal perspective with a limited crossover of the disciplines. This thesis not only crosses over the socio-feministic and the legal perspectives but additionally examines the religious discourse too. The thesis will first argue that Muslim women who veil or wear the hijab are silenced by the gender biased male interpretations of the sacred texts, perceived by Muslims as mandating the hijab or the veil through modesty codes as interpreted by male Muslim scholars. These scholars reject polysemic readings of the Qu'ranic verses pertaining to the hijab and the veil arguing the texts mandate Islamic modesty through covering, which they and some Muslims believe is important for deflecting the male gaze and controlling women's sexuality considered to be a threat to men. The effect of such male orientated interpretations silences Muslim women who wish to offer different interpretations of modesty and the divine texts. It will be argued that the current interpretations of these religious modesty codes suffer from a hermeneutic deficit, which needs to be overcome by re-interpretations to eliminate the patriarchal bias.

The thesis then proceeds to argue the oppression discourse on the hijab and veiling, which claims they are tools of oppression imposed by patriarchy and women who adopt such practices lack freedom of choice, but treats Muslim women as a homogenous category and fails to draw on the contexts and situational meanings of these religious symbols. Additionally, the allegations of false consciousness or adaptive preferences and the use of cultural insiders to corroborate the alleged oppressive nature of covering are self-serving, resulting in perpetuation of negative stereotypes whilst ignoring the voices of those women who attach their own meaning to the practice. The thesis then examines the emancipation discourse that relies on orientalism to rebut the oppression standpoint and claims the practice is based on free choice, which liberates women as it empowers them with the ability to penetrate public

¹⁰ Sieglinde Rosenberger and Birgit Sauer, *Politics, Religion and Gender: Framing and Regulating the Veil* (Sieglinde Rosenberger and Birgit Sauer eds, Routledge 2013) 4

space, assert their Muslim identity and use it as a form of resistance. The thesis will argue that although this view acknowledges the different contexts but is equally problematic as it is also essentialist and plays a part in stereotyping those Muslim women who do not cover as immodest and mutes women who oppose this position labelling them as dupes of the West.

Finally the thesis argues that women who veil or wear the hijab having had their voices abated by the religious and socio-feministic discourses turn to the European Court of Human Rights. Here the applicants claim their religious rights are breached when they are prevented from wearing the hijab in schools in Switzerland, higher educational establishments in Turkey and the full face veil or the Burqa in the public sphere in France. The thesis will analyse the resultant case-law from these claims under Article 9 European Convention on Human Rights (ECHR)¹¹ and by drawing from perspectives emanating from the religious and socio-feministic discourses, will add an additional layer of synthesis to the legal judgements. This additional synthesis will enable the argument that the ECtHR has not been polarity neutral as it has been influenced by the negative stereotypes emerging from the religious and socio-feministic discourses. And that in its failure to uphold the human rights of those who veil or wear the hijab, the ECtHR although having moved in the right direction, has also failed to listen to the voices of the women who veil or wear the hijab, delivering the final blow.

It is this triadic approach to the religious, socio-feministic and the legal discourse and how each treats those who wear the hijab or the veil, silencing them by their failure to take account of their contexts, meanings and motivations and the demonstration of a triple bind on Muslim women's choice of clothing that forms an original contribution to the existing knowledge.

Definitional issues

An initial consideration for the thesis was the question of terminology to be employed throughout the thesis when examining the veiling discourses on Islamic modesty, oppression and emancipation. As the thesis examines feminist theoretical frameworks in part one, simply using the label 'feminists' across all three discourses, particularly when referring to the socio-feministic discourses was problematic considering the multiplicity of feminisms and the internal debates and variances amidst the different forms of it. Replacing 'feminists' with a more narrower term 'non-Muslim feminists' and 'Muslim feminists' was also found to be problematic since not all non-Muslim feminists oppose the veil and not all Muslim feminists support it and both categories suffer from divisions within. For example the meaning of

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, hereafter referred to as ECHR

Muslim or Islamic feminist is highly contested and is still being negotiated by Muslim women, just as the different waves of Western feminism. Furthermore such categorisation would have excluded all those other women, Muslim or non-Muslim who do not hold themselves out to be feminists in the strict sense but still have strong views on veiling by Muslim women. For this reason more general and all-embracing terms such as ‘those who oppose veiling’ and ‘those who defend veiling’ have been employed throughout the thesis to eliminate definitional problems, of course the thesis does not totally exclude the term feminist.

There are many terms used to describe religious clothing by Muslims, the most common ones being: hijab,¹² niqab,¹³ abbaya,¹⁴ jilbab,¹⁵ lithma,¹⁶ burqa,¹⁷ chador,¹⁸ khimar,¹⁹ ghunghat²⁰ and dupatta.²¹ These terms are predominately products of culture and diverse Muslim societies and the literature is often confusing, as terms such as hijab and veil are used interchangeably by commentators. For the purposes of this thesis the term hijab will be used to denote head covering with the face and eyes exposed and veil will be used when referring to a head covering that includes covering the face with only eyes exposed whilst veiling can refer to either or both. The term burqa will be used to refer to a single garment that covers the whole body, head and the face, with a slit or meshing of fabric that allows a woman to see through it. The distinction between a full covering of the face as in a veil or the hijab that simply covers a woman’s hair, neck and chest is important for this thesis, as the hijab has been the subject of European Court of Human Rights (ECtHR) case-law surrounding teachers and students, whilst the veil and burqa have been subject to a general prohibition in public spaces in some

¹² Hijab is most commonly referred to as a piece of cloth that covers the woman’s hair and upper chest, but is also used to refer to covering the face

¹³ The niqab is the covering of the face with just leaving the eyes exposed

¹⁴ An outer garment worn by women from the Middle East, particularly from Saudi Arabia. It is long-sleeved, floor-length, and is worn from either the shoulder or the top of the head. The abaya is worn over normal clothes when a woman leaves her house and is designed to cover the contours of a woman’s body. It usually opens at the front, with overlapping layers or closing with ties or a zip. It is worn with a scarf which covers the hair, and often a veil which covers the face

¹⁵ An over-garment or cloak worn by Muslim women when in public. Sometimes refers to a specific style of cloak, similar to the abaya but more fitted and found in a wider variety of fabrics and colours. It looks more similar to a long tailored coat

¹⁶ The lithma is used to cover the head and face in Yemen

¹⁷ This type of veil and body covering conceals all of a woman's body including the eyes which are covered with a mesh screen and is common in Afghanistan

¹⁸ The chador is a head to toe wrap, generally black and worn by women in Iran

¹⁹ A general term for a woman's head and/or face veil. This word is sometimes used to describe a particular style of scarf that drapes over the entire top half of a woman's body to the waist

²⁰ The ghunghat is the end wrap on a saree which Indian women use to cover their head or veil when in front of strangers or the elder male members of the family

²¹ The dupatta is a long piece of material used as a head covering and worn with a shalwar kameez, the traditional dress of Pakistani women

European states. Items of clothing used for religious purposes in Islam are subject to diversity amongst different Muslim societies, cultures and context and there are variations in the terminology, type of covering and the shape and style of religious clothing but it is not necessary to go beyond the hijab, veil and the Burqa for the purposes of this thesis.

Choice of subject area

The selection of the subject area of this thesis was a result of Jack Straw's comments on veiling in 2006 which led to the sparking of the first major debate on veiling in the United Kingdom. This was not the first time the Muslim veil had become the focus of a national debate in a European signatory state to the European Convention on Human Rights; there had already been considerable public debate and opinion in France leading up to the legal prohibition on Muslim headscarves in French state schools, as well as in Turkey, which had banned headscarves in higher education establishments. The ensuing socio-feministic debates post Straw's comments were dominated by polarised standpoints of those who opposed and supported veiling, whilst the voices of Muslim women who wore the veil were absent. My expectations of an informed debate, stepping up from the French discourse on veiling and the hijab that was led primarily by those who adopted the practice and their reasons for doing so simply did not materialize. Instead two opposing camps emerged, the first arguing that the veil is oppressive and needs to be prohibited and the other that it is emancipatory, each using the presence and absence of choice as the driving force of their truth. The missing voices of those Muslim women who wore religious clothing pre and post Straw's comments appeared to have been replaced by the use of Muslim women as cultural insiders on behalf of those who oppose veiling. Surprisingly the same polemic standpoints were adopted when France banned full face veiling with the same contradictory claims demonstrating that the oppression and emancipation discourses dominate the debates. Indeed it is not just those against veiling who do not listen to the voices of veiled women; those who defend the practice are guilty of it too. A good example of this was the debate on banning veils in September 2013 by an Islamic television channel 'Ummah' that broadcasts globally. The TV channel aired the debate spanning three days with scholars and experts from various fields but the panel did not have a single veiled woman participating, yet the subject concerned a practice adopted by Muslim women in the face of adversity.²² Discussions during this debate were primarily focussed on the concept of Islamic modesty mandated by Islam and the Qu'ranic interpretations as provided by religious scholars vehemently arguing the obligatory nature of veiling. This debate

²² Ummah Channel, 'Niqab Debate- Highlights- Ummah Channel Show' (2013)
<<https://www.youtube.com/watch?v=G-DpSrwG9Uc>> accessed 20 October 2013

clearly demonstrates the part religious discourse plays in silencing Muslim women through mandating modesty requirements and it is indeed the reason why the thesis examines these interpretations or mis-interpretations in part one of the thesis.

A substantial element of part one of the thesis is based on the oppressive versus emancipation dichotomy of hijab and veiling and I am fully aware that such binaries are reductionist, essentialist and serve to oversimplify complex and interwoven issues. I also acknowledge that dichotomist perspectives can further create a distance between Islamic and Western cultures by focussing too much on differences through religious dress codes. The choice to examine these two polarities is specifically due to the 'head on clash' of the oppositions with each projecting its positioning as the real truth in the absence of alternative interpretations, which demonstrates what each discourse reveals and what it hides. This can be illustrated by the notion that oppression decreed by one discourse can mean the freedom espoused by another, or vice versa and the lack of universal agreement amongst Muslims whether the veil is obligatory or not or simply a cultural symbol. Ignoring alternative interpretations in such cases leads to a standpoint that can be problematic as it shows that the meaning of the veil is fixed, which is clearly not so. Therefore knowledge production based on a particular binary stance contains missing elements and in the case of the hijab and veiling they are the voices of the women who engage in the practice and attach a particular meaning to the veil with their own motivations and contexts. A good example of this can be found in the contradictory viewpoints of both discourses. One that supports the French ban on full face veils suggests that Muslim veiled women are subjugated, suppress their sexuality and that these women are victims of their traditions and patriarchal culture, as they do not wear it through choice, but pressure from the family and therefore a ban would emancipate these women,²³ yet the voices of those who veil indicate that they voluntarily adopt the practice and in many cases in opposition to the wishes of their family members.²⁴

Another reason for the choice of such oppositional discourses in the thesis is that although the socio-feminist discourse may play a part in social acceptance or rejection of veiling, which in turn may inspire policies or national laws controlling the practice, it is the ECtHR applicants look up to with an expectation of polarity neutral judgments in order to secure their human

²³ Ralph Grillo and Prakash Shah, 'Reasons to Ban? The Anti-Burqa Movement in Europe' Max Planck Institute <www.mmg.mpg.de/fileadmin/.../WP_12-05_Grillo_Reasons-to-Ban.pdf> accessed 21 December 2014, 17-28

²⁴ Open Society Foundations, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France* (Open Society Foundations, 2011) 15 <<https://www.opensocietyfoundations.org/reports/behind-veil>> accessed 20 January 2014

rights against a state that has interfered with their right to wear the hijab or the veil. An assessment therefore of whether any truths, stereotypes or assumptions stemming from the binary discourses have influenced the jurisprudence of the ECtHR analysed in part two of the thesis would not easily have led to a parity check, unless such oppositional discourses had been examined first.

The choice of discourses for this thesis is not to adopt one position over another but to question the existing polemics, which will allow consideration of alternatives helping bring to the surface the need to listen to the voices that have been silenced, as that would be a more discerning way of going beyond the stalemate created by oppositional stances. As the oppressive versus emancipation discourses are so oppositional, exploration of whether those women who veil embrace or reject either of the binaries or indeed attribute their own meaning to the veil depending on their situations is crucial to the debate. This is something those who have contributed to the discourses ought to be well aware of as 'Feminists know first-hand the feeling of being misrepresented and excluded from mainstream discourse'.²⁵

Polemic positions mask out any third or other position which is why women who veil are silenced by the debate leading to production and perpetuation of stereotypes. For example those who are pro veiling wish to project the positive stereotype to other others that veiled women are modest or pious, but they fail to realise that in holding that view, it leads to the negative stereotype that those who do not veil are immodest. Similarly both discourses construct the veiled woman as homogenous despite academic criticisms of such approaches²⁶ and fail to note that not all unveiled women agree with veiling and not all Muslims agree with the practice. Examining the two dominant discourses allows the examination of the tensions between the two, helping push beyond the static boundaries. This deconstruction will allow a space for the silenced voices of the veiled to be unmuted, leading to renewed understandings of the relativity of freedom and choice in veiling and penetration of the fixed boundaries by which socio-feministic discourses and the ECtHR have been influenced. It also allows different veiling contexts to surface instead of Muslim women being inscribed with identities by those who don't veil, yet participate in the knowledge production that affects women who do.

²⁵ Katherine Bullock, *Rethinking Muslim Women and the Veil: Challenging Historical & Modern Stereotypes* (The International Institute of Islamic Thought USA 2002) 37

²⁶ Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' [1988] *Feminist Review* 61; Homa Hoodfar, 'More than Clothing: Veiling as an Adaptive Strategy' in Sajida Alvi, Homa Hoodfar and Sheila McDonough (eds), *The Muslim Veil in North America: Issues and Debates* (Women's Press 2003); Anne Phillips, *Gender and Culture* (Polity 2010)

Thesis structure

The thesis is structured in two parts, the first part contains two chapters that examine the religious and the socio-feministic discourses associated with the hijab and the veil whilst the second part containing three chapters considers the legal discourse. Chapter one begins by providing an overview of the theological sources and how they have been interpreted by male Muslim clerics mandating religious clothing worn by Muslim women. A substantial part of the chapter examines the concept of Islamic modesty believed to be imposed by the religious texts and compares it to the general concept of modesty. The patriarchal and gendered bias prevalent in theological interpretations is examined including hermeneutical challenges by Muslim women who have and wish to re-interpret such sources to eliminate the bias. Chapter two of the thesis is a longer chapter and examines the two dominant discourses claiming the practice of wearing the hijab and the veil is a tool of oppression of Muslim women and is means of empowerment respectively. Theoretical frameworks surrounding freedom and choice and what that means to those who oppose the practice and those who defend it are examined in detail. The chapter also examines how those who oppose religious clothing have made use of cultural insiders to further perpetuate the stereotype that Muslim women who wear religious clothing are oppressed.

The thesis then moves onto part two containing chapters three, four and five, with chapter three setting out the legal framework of the European Convention on Human Rights with a discussion of the interpretive principles used by the court when adjudicating on human rights claims. The emphasis of this chapter is to lay down the operative framework of Article 9, which protects religious freedom that has been invoked by all three of the applicants who have been prohibited from wearing the hijab in school and higher educational establishments and the face veil in the public sphere in France. Chapter four analyses the ECtHR judgements in the cases of *Dahlab v. Switzerland*²⁷ where a primary school teacher was prohibited from wearing a hijab in school and *Sahin v. Turkey*,²⁸ which concerned a student prohibited from wearing the hijab in university. Chapter five, the final chapter examines in detail the decision and reasoning provided by the ECtHR in *S.A.S. v. France*²⁹ in denying the claim based on prohibition of the full face veil in all public spaces in France. The thesis then finishes with a concluding chapter bringing together issues from part one and part two.

²⁷ *Dahlab v. Switzerland* App no 42393/98, (15 February 2001)

²⁸ *Leyla Sahin v. Turkey [GC]* App no 44774/98, (10 November 2005)

²⁹ *S.A.S. v. France [GC]* App no 43835/11, (1 July 2014)

PART ONE

CHAPTER ONE –VEILING AS A RELIGIOUS IMPERATIVE

Introduction

In this chapter, religious imposition of Muslim dress codes and the doctrine of modesty as believed by Muslims will be considered. The aim of the chapter is to first give an overview of Islamic theological sources that have generated the doctrines relating to veiling and modesty and then proceed to an examination of the implications of male oriented interpretations of religious texts, which some Muslims believe mandate the hijab and the veil. The Muslim veil has become a term loaded with many contextualised meanings and is at variance throughout the world, generating support and dissent from all quarters. The re-interpretation of the sacred texts, in an attempt to eliminate patriarchal and gendered readings of the sacred Islamic texts by some Muslim feminists is one of the challenges examined in the chapter. The focus on the religious principles that give rise to the mandate on veiling is important for the later analysis of religious freedom, as guaranteed by the European Convention on Human Rights. This religious freedom is invoked by applicants when an assertion is made that a state has breached their freedom by limiting or prohibiting the wearing of religious symbols. The more specific socio-feministic debates surrounding patriarchy, agency and oppression associated with the hijab and the veil including views of those who support and oppose the practice will be analysed in the next chapter.

The veil as a cultural edict

Most Muslim women who veil defend the practice on the grounds that it is mandated by religion but this standpoint is not without rebuttal, as there is no universal agreement amongst Muslims whether that is the case, though there is consensus that the hijab is mandatory. There are Muslim scholars who are of the view that it is not mandated by the Qur'an and it is simply a historic relic, thus not a duty imposed on women. For example Dr Taj Hargey who is an Imam of the Oxford Muslim Education Centre in the United Kingdom insists that veiling has no basis in Islam and can be prohibited. He asserts that 'Women should be reminded that as face-masking is not found in Islam's transcendent text; it is therefore a non-Koranic and un-Islamic habit, not a fundamental feature of their religion. Islam is not a faith of superficial

symbolism.³⁰ In a debate held by the Cambridge University Union Society on whether the veil empowers women, he refers to it as a 'scrap of cloth that is a relic of the past' and is not imposed by the Qur'an.³¹ The imam is considered to have radical views since he has departed from those of mainstream Muslims by conducting marriages between Muslim women and non-Muslim men that is considered to be non-Islamic. He has been accused by a weekly newspaper of not being a true Muslim, an allegation considered extremely offensive against a Muslim, which led him to successfully suing the newspaper in the High Court receiving substantial damages.³²

Hargey's view is corroborated by other Muslim scholars such Tariq Ramadan who giving evidence before the French Gerin Commission that was established to consider the prohibition of full face veiling in France to the effect that the burqa or face veil are not an Islamic requirement.³³ El Guindi also asserts that 'Islam did not invent or introduce the custom of veiling'³⁴ suggesting it was a custom prior to the advent of Islam. According to her it was worn by women of Hellenic, Byzantine and Balkan cultures and the adoption of veiling in Arab social systems holds a different meaning and function to those northern Mediterranean regions. It is acknowledged by other commentators that Greek and Roman women veiled in pre-Islamic times and that veiling in Arabia had no connection with seclusion of women.³⁵ And it was common for women to be seen in public wearing the veil as it was considered a status symbol and not a religious one,³⁶ just as it was a custom in ancient Greece.³⁷ Stubbings refers to discoveries of remains from Troy that included head dress made from gold,³⁸ whilst discovery of early coins have provided evidence of head coverings in Greco-Roman times.³⁹ According to

³⁰ Dr Taj Hargey, 'The burka is an alien, cultural monstrosity.... and it CAN be banned in Britain' *Mail Online* <<http://www.dailymail.co.uk/debate/article-1375770/France-burka-ban-Burka-alien-cultural-monstrosity-CAN-banned-Britain.html#ixzz2yEnv9nTp>> accessed 14 december 2012

³¹ The Cambridge Union Society, 'The House believes the veil empowers women' (*YouTube*, 2011) <<http://www.youtube.com/watch?v=2iLtQ0cLzKA>> accessed 22 December 2013

³² Tom Whitehead, 'Imam wins landmark battle against 'Muslim McCarthyism'' *The Telegraph* (8 April 2009) <<http://www.telegraph.co.uk/news/religion/5126155/Imam-wins-landmark-battle-against-Muslim-McCarthyism.html>> accessed 12 August 2012

³³ Grillo and Shah, *supra* (n 23) 19

³⁴ Fadwa El Guindi, *Veil: Modesty, Privacy and Resistance* (Berg 2000) at 149

³⁵ Gertrude Henrietta Stern, *Marriage in Early Islam* (Royal Asiatic Society 1939) 108

³⁶ Yedida Kalfon Stillman, *Arab Dress: From the Dawn of Islam to Modern Times* (2nd edn, Brill Academic Publishers 2003) 19-20

³⁷ Lloyd Llewellyn-Jones, *Aphrodite's Tortoise: Veiled Women of Ancient Greece* (Classical Press of Wales 2010)

³⁸ Frank Stubbings, *The World of Archaeology: Prehistoric Greece* (Hart Davis 1972) 21

³⁹ Michael Marlowe, 'Headcovering Customs of the Ancient World: An Illustrated Survey' <<http://www.bible-researcher.com/headcoverings3.html>> accessed 12 June 2014

Shirazi during the Assyrian, Greco-Roman, and Byzantine empires, veiling and seclusion were badges of prestige and symbolised status as only the wealthy could afford to seclude women.⁴⁰ The practice of head covering in the monotheistic religions has been associated with nobility of women and a symbol of freedom and virtue⁴¹ and it is specifically used as a form of respectability, and as a status symbol and as a sign of modesty in countries such as Oman, Sudan and Yemen.⁴²

Though there is ample evidence of veiling being rooted in culture pre-dating Islam,⁴³ interpretations of certain Qur'anic verses discussed later in the chapter lead Muslims to believe that post Islam, it has become a religious obligation. However this does not mean that Muslim women do not wear the veil or the hijab for cultural reasons. Wing & Smith refer to a study carried out by Gaspard and Khosrokhaver, who suggest that some women pre-adolescent and adolescent veil or wear the hijab in order to comply with important family values and the family pressure was to wear hijab to school or they would be prevented from attending, whilst there were other times where the pressure was not direct, but hijab was worn to maintain the respect of their fathers and brothers.⁴⁴ This illustrates that patriarchal impositions can and do play a part in women's decisions to wear the hijab, which in this case is used as a symbol of honour and a transmitter of protected sexualities. Thus freedom and choice is negotiated in order to gain access to public spaces and to prevent 'disgracing family honour if they do not choose to wear the headscarf'.⁴⁵ This may be important as there are cultural influences such as pressures on women to choose the right husband and veiling in some cases acts as a device that helps in the competition for husbands.⁴⁶

Conversely, Wing and Smith also cite Hashmi's study, which shows that some girls wear the hijab despite their family disapproving of it and many had mothers who did not veil.⁴⁷ Such a contrast of the lack of or exercise of choice is not uncommon amongst those who wear the

⁴⁰ Shirazi, supra (n 5) 4

⁴¹ Metin Toprak and Uslu Nasuh, 'The Headscarf Controversy in Turkey' (2009) 11 *Journal of Economic and Social Research* 43

⁴² Malek Chebel, *Symbols of Islam* (Rizolli International 1998) 111

⁴³ Hargey, ; Laila S. Dhan, 'The Hijab as Cultural Edict, Not Islamic Obligation' (*Nomos Journal*, 2012) <<http://nomosjournal.org/2012/01/the-hijab-as-cultural-edict-not-islamic-obligation/>> accessed 5 September 2013;

⁴⁴ Adrien K. Wing and Monica N. Smith, 'Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban' (2006) 39 *Davis Law Review* 743, 762

⁴⁵ *Ibid* 761

⁴⁶ Pat Mule and Diane Barthel, 'The Return to the Veil: Individual Autonomy vs. Social Esteem' (1992) 7 *Sociological Forum* 323

⁴⁷ Wing and Smith, supra (n 44) 762

hijab or the veil and indicates the importance of situational contexts of those who engage in the practice as well as the fluid meaning. However studies have also shown that some women may become the targets of violence or would veil in order to avoid being inscribed with derogatory labels as noted by one of Killian's respondent's: 'A girl who wears the veil, that means that she's pure and the other who doesn't wear the veil, she's not pure...it's that she's a slut'.⁴⁸ Veiling as a cultural concept if it is imposed on women has the capacity of limiting a woman's autonomy, particularly if she has no motivations to wear it. Whereas if it was a religious obligation, it can be argued she may have made a conscious choice to conform to a religious duty. Although there are some who do not believe in God and are of the view that religion is a matter of opinion,⁴⁹ which means that people have a choice in the matter as opposed to a religious mandate which negates that choice.

The veil as a Qur'anic commandment

There is general consensus amongst Muslims that there is a religious duty for Muslim women to wear the hijab but there is no such agreement relating to the veil. However some Muslim scholars deny the hijab or the veil as a religious obligation on the grounds that those who believe it is mandatory base their convictions on mis-interpretations of religious texts. For example Sheikh Mustapha Mohamed Rashed a Muslim scholar at Al Azhar University in Egypt defended his PhD thesis concluding that the hijab or the veil is not an Islamic duty. The fact that his thesis was allowed to be defended at Al Azhar that is considered by Sunni Muslims as the foremost seat of learning adds credibility to his views and at the same time makes it controversial. The scholar argued that hijab referring to head covering is not mentioned in the Qur'an, but despite that 'a bunch of scholars insisted vehemently that the veil is both an Islamic duty and one of the most important pillars of Islam'. He further adds that the 'scholars de-contextualised the verses of the Qur'an and interpreted them in their own liking...and rejected reasoning and relied only on literal text'.⁵⁰

There has been no general consensus amongst those Muslim scholars who played a part in some of the historic interpretations of sacred texts whether veiling is mandatory and it is evident from the comments of Dr Taj Hargey, Tariq Ramadan and Sheikh Mustapha Rashed

⁴⁸ Caitlin Killian, 'The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17 *Gender Society* 567, 583

⁴⁹ A.C Grayling, *The God Argument: The Case Against Religion and For Humanism* (Bloomsbury Publishing 2013)

⁵⁰ Jamal Saidi, "'Hijab is Not an Islamic Duty' - Scholar' *Morocco World News* (Casablanca, 24 June 2012) <<http://www.morocoworldnews.com/2012/06/45564/hijab-is-not-an-islamic-duty-scholar/>> accessed 10 August 2012

that such lack of consensus still exists amongst Muslims. There is credible theological opinion that sways towards veiling being a product of culture, as opposed to a religious requirement and there is no shortage of Muslim commentators who share that sentiment.⁵¹ There is resistance primarily from some Muslim community leaders to label the practice as being cultural, because having it declared a religious obligation leaves greater scope for its imposition and compliance with other Islamic dress codes.⁵² This is especially so in European countries where acculturation of dress by younger Muslim women can be resisted if veiling is universally accepted as a religious injunction. But even if it is mandated by religion, then the extrapolation of the principles via strained interpretations of religious texts is questionable, as will be seen later in the chapter.

It is apparent from the previous discussion that there is a body of Islamic authority that challenges the origin and nature of veiling holding it an object of culture and it will be shown later in the thesis that some conservative Islamic scholars propagate it as a religious requirement. Despite such uncertainties and the difficulty of settling the debate due to its complexity on which a discussion is beyond the scope of this thesis, what matters is the importance of the belief and perception of Muslims that veiling has its origins in the Qur'an, which Muslims believe is the word of God transmitted orally to the Prophet Mohammad through the archangel Gabriel.⁵³ Islam⁵⁴ conveys a total way of life with its teachings that extend to almost every aspect of the believer's life including modesty and dress,⁵⁵ which is why the question of whether the dress codes are mandatory or not becomes a passionate issue as Islam requires Muslims to comply with all religious duties.

The hierarchy of Islamic rules

It is believed that the first revelation of the Qur'an took place in 610 AD with the whole of it revealed over a period of twenty three years and was written down at around 650 AD after Prophet Muhammad's death in 632 AD. The Qur'an is structured into 114 chapters referred to as *suras* which are further divided into verses known as *ayats*.⁵⁶ The suras are all of different lengths and were revealed whilst the Prophet Mohammad was in Mecca and in Medina. For Muslims the Qur'an is the primary source of Islamic law, followed by *Sunnah*, which are the

⁵¹ Dhan, supra (n 43)

⁵² 'Women wear veil because it says so in Quran' *Asian Image* (Blackburn, 14 July 2009) 1
<<http://www.asianimage.co.uk/news/4491608.print/>> accessed 5 December 2009

⁵³ Pronounced as Jibraeel in Arabic

⁵⁴ The Arabic translation of the word is 'submission'

⁵⁵ Chris Horrie and Peter Chippendale, *What is Islam?* (Virgin Books 2007) 3

⁵⁶ There are over 6000 verses in the Qur'an

deeds, teaching, practices and sayings of the Prophet. These were communicated via chains of transmissions from the Prophet's time and recorded in a collection of *Hadiths*, a secondary source of Islamic law. The Qur'an does not contain suras in the order they were revealed, but contains the longer suras at the beginning and the shortest and those revealed earliest at the end. As the Qur'an is not a narrative or an argument that needs to run sequentially, it contains pronouncements that reflect on a multitude of divine and worldly themes.

The deduction and interpretation from the teachings of both the Qur'an and the Sunnah by Muslim scholars has become to be known as *Sharia* or Islamic law. However, the divine guidance contained in the Qur'an is not always intelligible to the average mind, as alluded to in Scripture, especially when it comes to the extrapolation of law from the Qur'an. There are also principles of interpretation that are applied in the attempt at understanding the Divine will. This field of expertise is referred to as *Tafsir*⁵⁷ or Qur'anic hermeneutics. The field of hermeneutics is defined by the Stanford Encyclopaedia of Philosophy as 'both the first order art and the second order theory of understanding and interpretation of linguistic and non-linguistic expressions'.⁵⁸

In the field of Qur'anic hermeneutics, the first source of law used is the Qur'an, however, if particular parts of the Qur'an are not clearly understood by the reader in light of other verses on the subject, then recourse is taken to the Hadith or the prophetic tradition, as the Qur'an itself confirms the Prophet Muhammad to be the primary human exegete of the divine word. This prophetic exposition is followed by the interpretations of those who were the close companions of Prophet Mohammed in the era of divine revelation; the Sahabah⁵⁹ and their successors. The Arabic language and human understanding are additional sources of Qur'anic interpretation used to guide authentic elucidation; working within the parameters set by the said sources of Islamic law.

The pronouncements on how Muslims should conduct themselves and behave in everyday life comes directly from the Qur'an and thus Muslims are highly sensitive to arguments raised against any of the Qur'anic injunctions as they are bound by these to obey God's will.⁶⁰ This is one of the key reasons women who wear the hijab or the veil take objection to challenges to

⁵⁷ 'Tafsir' means exegesis

⁵⁸ Bjorn Ramberg and Kristin Gjesdal, *The Stanford Encyclopaedia of Philosophy: Hermeneutics* (Summer edn, 2013)

⁵⁹ The Sahabah were the Prophet's closest companions

⁶⁰ Feisal Abdul Rauf, *Islam: A Search for Meaning* (Mazda Publishers 1996)

the practice. Interpreting the Qur'an is a highly complex matter and Muslim scholars have to pay regard to many principles associated with it and the Sunnah before arriving at an authoritative meaning.⁶¹ The scholars themselves were required to have had expert training and Islamic knowledge, before their interpretations were accepted as a source of Sharia.⁶² Any analysis of the verses of the Qur'an will be limited to the issue of the compulsory nature of veiling, as it is beyond the scope of this thesis to engage in discussion and conflicts surrounding the different schools of thought and the resultant jurisprudence stemming from any sectarian disputes relating to particular forms of veiling.

The specific verses in the Qur'an relating to veiling

The Lanes Arabic/English Lexicon⁶³ gives nine different meanings of the word hijab, the four meanings that are relevant to the discussion are given as something that: (1) prevents, hinders or precludes (2) conceals, veils, covers (3) intervenes between two bodies (4) a partition or a barrier. However, in modern Arabic, hijab has been interpreted as a woman's veil. This is the modern understanding of the term previously not recognised by the Lexicographer's of Arabic and the word is commonly understood as meaning 'a head covering worn in public by some Muslim women'.⁶⁴ Muslims today understand the word as meaning a total covering of a woman's body including/not including face and hands, face veil or a head covering only. The term hijab has been used seven times in the Qur'an⁶⁵ with all the meanings of the word

⁶¹ Deducing the law from its sources, textual implications, commands and prohibitions, abrogations, consensus, analogical deduction, preceding laws, fatwas, equity in Islamic law, custom, public interest, presumption of continuity, conflict of evidence, personal reasoning and precedent

⁶² The typical areas of knowledge and expertise required are: logical reasoning, principles of jurisprudence, Qur'anic exegesis, Qur'an sciences, study of hadiths/traditions, science of narration, history, theology, language studies, Islamic philosophy and Islamic mysticism.

⁶³ www.laneslexicon.co.uk

⁶⁴ <http://oxforddictionaries.com/definition/english/hijab?q=hijab>

⁶⁵ All English translations of the Qur'an in this thesis have been taken from Mohammed Marmaduke Pichhall, *The Meaning of the Glorious Koran: An Explanatory Translation* (Kazi Publications 1996); **Sura 7:46** Between them is a veil. And on the Heights are men who know them all by their marks. And they call unto the dwellers of the Garden: Peace be unto you! They enter it not although they hope (to enter); **Sura 17:45** And when thou recitest the Qur'an we place between thee and those who believe not in the Hereafter a hidden barrier; **Sura 38:32** And he said: Lo! I have preferred the good things (of the world) to the remembrance of my Lord; till they were taken out of sight behind the curtain; **Sura 41:5** And they say: Our hearts are protected from that unto which thou (O Muhammad) callest us, and in our ears there is a deafness, and between us and thee there is a veil. Act, then. Lo! We also shall be acting; **Sura 42:51** And it was not (vouchsafed) to any mortal that Allah should speak to him unless (it be) by revelation or from behind a veil, or (that) He sendeth a messenger to reveal what He will by His leave. Lo! He is Exalted, Wise; **Sura 19:17** And had chosen seclusion from them. Then We sent unto her Our Spirit and it assumed for her the likeness of a perfect man; **Sura 33:53** O Ye who believe! Enter not the dwellings of the Prophet for a meal without waiting for the proper time, unless permission be granted you. But if ye are invited, enter, and, when your meal is ended, then disperse. Linger not for conversation. Lo! that would cause annoyance to the Prophet, and he would be shy of (asking) you (to go); but Allah is not shy of the truth. And when ye ask of them (the wives of the Prophet) anything, ask it

centred around screening and prevention,⁶⁶ suggesting that its meaning in the Prophet Muhammad's times was understood to be a screen or a barrier, with a further two verses of the Qur'an that mention dress codes specifically for Muslim women.⁶⁷ Chronologically the Verse of the Qur'an that is associated with the hijab in terms of seclusion of women from men is sura al-ahzab 33:53 which states:

Enter not the dwellings of the Prophet for a meal without waiting for the proper time, unless permission be granted you. But if ye are invited, enter, and, when your meal is ended, then disperse. Linger not for conversation. Lo! That would cause annoyance to the Prophet, and he would be shy of (asking) you (to go); but Allah is not shy of the truth. And when ye ask of them (the wives of the Prophet) anything, ask it of them from behind a curtain. That is purer for your hearts and for their hearts. And it is not for you to cause annoyance to the messenger of Allah, nor that ye should ever marry his wives after him....⁶⁸

This verse is the one that is often referred to as the 'hijab' verse and is considered to be the very first divine guidance on seclusion of the Prophet's wives from men, due to the nature of their high status and dignity that forbids any man to marry any of them. The verse also gave guidance to the community on the manners and etiquette that had to be exercised when dealing with contact with the Prophet and his home life. The background and supplementation to the revelation of the verse is contained in the Hadith by Sahih Bukhari, narrated by Anas bin Malik.⁶⁹ The Qur'anic verse supplemented by the Hadiths considered a commandment that when men were to speak to the prophet's wives, they were to do that from behind a curtain, partition or a screen so as to protect the privacy of the Prophet as his home was part of the Mosque where there were regular visitors. The verse led to distinct separation of the Prophet's wives quarters and the mosque, in effect creating the divide between the private and the public.

of them from behind a curtain. That is purer for your hearts and for their hearts. And it is not for you to cause annoyance to the messenger of Allah, nor that ye should ever marry his wives after him. Lo! that in Allah's sight would be an enormity.

⁶⁶ Muhammed Ibn Ahmed Ibn Ismail, *The Veil: Evidence of Niqab* (Al Firdous 2009) 93

⁶⁷ Sura 24:30-31; Sura 33:59

⁶⁸ Picthall, supra (n 65)

⁶⁹ All Hadiths cited in the thesis have been taken from www.Hadithcollection.com; Sahih Bukhari Volume 7, Book 62, Number 95

Maududi has interpreted the verse to include all women and not specific to the Prophet's wives, insisting that the Muslim woman's Islamic dress includes the face veil and covering of the hands too. His opinion is that despite there being no mention of the veil in the Qur'an it is Qur'anic in spirit and strict seclusion of all Muslim women is necessary.⁷⁰ The majority view of Islamic scholars is that the commandment was for the Prophet's wives themselves to be secluded from men due to their status, and as such, the verse only applied to them and not women in general. There are those who interpret the same verse to mean seclusion for women generally based on the philosophy that emulating the actions of the Prophet's wives results in elevation of their piety. Madani is of the opinion that these are the etiquettes Allah taught the wives of the Prophet and since all of the Muslim Ummah⁷¹ are required to follow their example, these commandments are applicable to all Muslim women.⁷² Indeed all Muslims aspire to follow the ways of the prophet Mohammed and his household, but these are strained interpretations that are neither literal nor inter-textual and fail to take into account of the context in which the verse was revealed and the privileged status of the prophet's wives, as it specifically refers to his wives and prohibits marriage to them by anyone else, clearly excluding any other meaning.

Stowasser's perspective on the verse is that it 'legitimised the medieval institution of women's separation that became a distinctive feature of life at least from the upper-class urban dwellers among them'.⁷³ In a historical context, the view that the verse applies to all women cannot hold true, as during those times women had to leave their homes for open defecation and therefore total seclusion was not possible. It is claimed by Rahman that the verse refers to the Prophet's wives only due to their position and not all the women of Medina. He is categorical in his approach to the meaning being attributed 'In no way could this obligatory duty of the wives of the Prophet be forcibly thrust upon other Muslim women as a compulsory duty'.⁷⁴ He further states that if women wanted to adopt the verse for themselves, it would be their choice and would be considered a 'noble gesture on their part'.⁷⁵ But if the Qur'anic mandate intended for the wives of the Prophet is emulated by Muslim women in general on these grounds, then surely all Muslim women have to remain in seclusion and never come into

⁷⁰ Abul Aala Maududi, *Purdah and the Status of Women in Islam* (Kazi Publications 1979)

⁷¹ In Islam 'ummah' means the entire community of believers

⁷² Dr. Mohammed Ismail Memon Madani, *Hijab: The Islamic Commandments of Hijab* (Darul Ishaat Karachi 2000) 13

⁷³ Barbara Stowasser, *Women in the Qur'an, Traditions, and Interpretation* (Oxford University Press 1996) 98

⁷⁴ Afzal Ur-Rahman, *Role of Muslim Women in Society* (Seerah Foundation 1986) 422

⁷⁵ Ibid

contact with any men. This would make redundant the other verses discussed later that command lowering of the gaze by men and women, and also counter arguments raised by Muslim women in Europe against those who deem veiling and seclusion to be oppressive and gender biased.

Mernissi takes a disparate approach and claims that the verse was revealed to create separation between two men and not men and women and as such, it protected the privacy of the Prophet in his nuptial chamber being shielded from other men. She does not state how she arrived at that opinion as her view is not substantiated in her discussion about the verse and neither does it resonate with the Quoted Hadith relating to the revelation of the verse. If her assertion was to be considered, it would leave open the question as to why direct reference was made to the Prophet's wives in the verse.⁷⁶ She further contends that hijab is dimensional in that it is spatial, as it marks or separates a border and ethically it belongs to the forbidden 'A space hidden by a hijab is a forbidden space'.⁷⁷ Mernissi sees the situation surrounding the Prophet's wedding as an example of Muslim society having become too invasive into the life of the prophet and because he was too polite to make any comments, 'the hijab came to give order to a very confused and complex situation'.⁷⁸ It can be argued that the verse is directed at men since according to the Hadith that forms the background for the verse, it was men who were overstaying their welcome at the prophet's household post the wedding ceremony and therefore, the signal to men is quite clear to refrain from such behaviour. The suggestion that the verse has universal application and applies to all women would be placing the burden on women to bear the consequences of the actions of men. The next verse revealed in the Qur'an that has relevance to women's dress was 33:59:

O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloaks close round them (when they go abroad). That will be better, so that they may be recognised and not annoyed. Allah is ever Forgiving, Merciful.⁷⁹

This verse is considered to have been revealed in the context of the jaliyah⁸⁰ period, during which women were regularly leered at by men and rude comments made about them when

⁷⁶ Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Perseus Publications 1992) 88

⁷⁷ Ibid 93

⁷⁸ Ibid 92

⁷⁹ Pickthall, *supra* (n 65)

they went out of their homes. Women during that period were considered objects of sexual pleasure and property of men, to deal with the way they wanted to.⁸¹ Those men engaging in the rude gestures and behaviour would plead that they cannot identify the respectable women from the unchaste. This was a period where sex was a freely available commodity and according to Ahmed 'Women were purchased and sold like livestock and chattels. They were forced into marriage and prostitution; they would be inherited but not inherit; possessed but not possess'.⁸² In such times where gender inequality was the norm and as a leader of Muslims the prophet bore responsibility for the safety of everyone in Medina the verse was revealed in order to deal with this situation.

Although this verse does not create any new form of women's dress, it does command modification of the way that dress had to be worn by them. The verse instructs the Prophet's wives and women in general to cover themselves with their jilbab when coming out of their homes. The verse unlike the previous one that specifically mentions the Prophet's wives, suggests that seclusion was not necessary for any woman and the verse applied to all women and not just restricted to the Prophet's wives only. According to Ali the purpose of covering:

was not to restrict the liberty of women, but to protect them from harm and molestation under the conditions then existing in Medina. In the East and in the West, a distinctive public dress of some sort or another has always been a badge of honour or distinction, both among men and women.⁸³

The interpretation of the obligation under this verse did create a two tiered society, where females were categorised as believers and non-believers, leaving open the interpretation that Islam considered it acceptable for non-believing women to be molested but not believing women. The verse meant that women who were slaves and prostitutes would clearly stand out from the veiled women, indicating they were open to abuse that was deemed acceptable to men. This was a situation that was not favoured by the Prophet but in order to prevent civil unrest in Medina, he was forced to tolerate it. Mernissi refers to this situation as 'the vestige

⁸⁰ Jaliyah as an Arabic concept means 'ignorance of divine guidance' or 'the 'days of ignorance' and is used in the Qur'an when referring to the condition of the pre-Islamic Arab people

⁸¹ Omar Ahmed, *Women in Jahiliya and Islam* (Al Firdous 2001) 20

⁸² Ibid 14

⁸³ Abdullah Yousaf Ali, *The Holy Quran: Text Translation and Commentary* (3rd edn, Kashmiri Bazaar 1938) 1126

of a civil war that would never come to an end'.⁸⁴ The verse is also clear in that it allows women to step out of their homes so long as they are recognisable which suggests that the previous verse cannot call for seclusion of all women. Although the Qur'an did later reveal a verse that imposed restrictions on the male gaze and modesty requirements for men too, any application of such commandments was considered applicable to Muslims only thus leaving the non-Muslim men who did not feel bound, to possibly continue with their inappropriate behaviour against non-Muslim women.

As long as women embrace the veil as a portable shelter without which they cannot enter public space, considered the domain for men by men, then women who veil transmit the message that Muslim society does not have to afford safety for women. If veiling is the only method of remaining safe because it wards off unwarranted attention from men, then the practice of veiling itself must increase hostility from men towards those who do not veil. Arguably, this means a minority of veiled women are responsible for deflecting harassment on to a majority who do not veil, thereby playing a role in advancing harassment to others. This defies the logic behind veiling if it is a voluntary choice, since it means that being unveiled, a woman cannot be held morally blameworthy for subjecting other women to harassment, but if veiled then it does have that outcome which defies the pious nature of the veil. The application of this verse in current times is difficult to justify, as there are laws that protect all, not just women and certainly not just Muslim women from harassment in public places. Thus the application of Qur'anic commandments that were aimed at dealing with a specific problem, by a specific group of people, at a specific period in history, have no place in modern times as those specificities do not exist. As the aim of the verse is to facilitate recognition, it cannot have any application in Muslim countries since the issue of differentiating non-Muslims and Muslim women does not arise, making the verse confined to history and redundant in contemporary society. The verse in the Qur'an that is considered to have the most direct relevance to the issue of Islamic dress codes is contained in sura al-nur 24:31:

And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, and to draw their veils over their bosoms, and not to reveal their adornment save to their own husbands or fathers or husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male

⁸⁴Mernissi, supra (n 76) 191

attendants who lack vigour, or children who know naught of women's nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment.⁸⁵

This verse is considered significant for Muslim women in a number of respects. Firstly it instructs women to lower their gaze and be modest. According to the Hadith, in Islam the first look at the opposite sex is considered to be allowed if the purpose is not related to sexual desire or attention, but the second look, which would be deliberate is classed a sin.⁸⁶ The verse has been interpreted by Islamic scholars as imposing a requirement of modesty before God and men, the notion being that if there is no eye contact between the opposite sex the temptation or desire will not arise. Secondly, the verse demands caution in the adornment of the body so that it does not attract men, adornment is considered any apparel or the manner in which it is worn that would attract such attention. Thirdly, to cover the bosom means to wear the hijab and as a minimum the body should be covered so as not to reveal the natural curves of a woman and the head to be covered. The verse does not specifically state that veiling is required, yet there is a level of consensus amongst some Muslim scholars that it does impose a requirement that the head is covered but no real consensus as to the form of covering, a point with which Roald agrees on adding that the form is different from one state to another and from one culture to another.⁸⁷ Fourthly, the verse stipulates the category of men a woman is not allowed to have sexual relations with⁸⁸ and needs to observe the hijab when in front of them, and those she does not need to cover in front of. Lastly, a Muslim woman is forbidden to use jewellery that jingles, such as anklets which by the sound they make would naturally attract the male attention to specific parts of the body.

Male attraction by whatever means is at the forefront of the verse, and as such the Qur'an has allowed flexibility in the obligation to observe the hijab, for example, old women are exempt.⁸⁹ But it is not comprehensible that if the verse as interpreted by Muslim scholars imposes such burdens on women then why are there not similar burdens relating to covering of the head

⁸⁵ Picthall, supra (n 65)

⁸⁶ The Messenger of Allah (Peace & Blessings of Allah be upon Him) said: "O Ali, do not follow a glance with another, for you will be forgiven for the first, but not for the second." Reported by al-Tirmidhi, 2701

⁸⁷ Anne Sofie Roald, *Women in Islam: The Western Experience* (Routledge 2001) 271

⁸⁸ A woman is forbidden to marry men who are 'mahram' and any sexual relations with these men are classed as incestuous

⁸⁹ Sura 24:60: 'As for women past child-bearing, who have no hope of marriage, it is no sin for them if they discard their (outer) clothing in such a way as not to show adornment. But to refrain is better for them...'

imposed on men? If the covering of the hair which is considered to have some sexual quality, even though there is no direct evidence of this provided by any Muslim scholar as to what and how this sexual quality arises? Then why is that men's hair does not possess the same sexual quality warranting covering? In contemporary society, women and men's hair can resemble similar features in length, texture and even styles. For example many women have short cropped hair and many men have very long hair tied in pony tails. It is stated in Sura 24:30 that men must lower their gaze and be modest. Despite this clear commandment that applies to men to lower their gaze and precedes the equivalent verse that applies to women, there still appears to be a belief held by Muslim scholars and men that women are responsible for attracting male attention. If men were to obey this Qur'anic commandment as they are supposed to, the obligation on women would not be as burdensome.

Doi notes that although the obligation to observe modesty is equal 'on account of the difference between men and women in nature, temperament and social life, a greater amount of covering is required for women than for men, especially in the matter of dress' but he does not elaborate on the detail of these differences or their basis.⁹⁰ This is typical of Muslim scholars placing the unequal burden on women who have to bear responsibility to avert the male gaze. It is also arguable that since the verse that commands men to avert their gaze was revealed first and if acted upon men would not look at a woman in ways that encourage lustful desires, then the requirement for women to veil becomes redundant. And as such if men insist on unwarranted gazes at unveiled women then they must bear the religious consequences.

Madani believes that this command provides the best preventative strategies for the protection of the honour of men and women and shapes and cleanses their inner self,⁹¹ his opinion being closely based on the Qur'anic principle that if some act or behaviour can lead to sin, then that act or behaviour would be forbidden. For example adultery is forbidden and looking at a woman or a man can lead to that, therefore gazing at the opposite sex is forbidden. Maududi takes a social based approach and is of the opinion that the social law of Islam is to safeguard the institution of marriage, which prevents sexual anarchy and eliminates sexual excitement. According to him, this is achieved by regulating body coverings; a pillar of the social system of Islam.⁹² But he does not expand further on how body coverings would protect the institution of marriage? it can be argued that if men and women were modest then

⁹⁰ Abdur Rahman I. Doi, 'Women in Society' (*Muslim Students Association of IUPUI*, 2005)
<<http://www.iupui.edu/~msaiupui/womeninsociety.html>> accessed 2 March 2014

⁹¹ Madani, supra (n 72) 29

⁹² Maududi, supra (n 70) 216

the opportunity for attraction to the other sex should not arise and if a man knows that a woman who wears the hijab is signalling a 'no go area' then not only is the man deterred, but a married woman would have the comfort that her own husband is not likely to be entertained by another woman, due to the obligation of body clothing and lowering of the gaze.

Mernissi elaborates on the importance of this social order in Islam: 'Aggression and sexual desire, for example if harnessed in the right direction, serve the purposes of the Muslim order; if suppressed or used wrongly, they can destroy that very order'.⁹³ According to Murdoch, the way societies regulate sexual instinct divide into two groups, one group is able to enforce respect of sexual rules by a 'strong internalisation of sexual prohibitions during the socialization process', whereas the other regulates the same respect by 'external precautionary safeguards such as avoidance rules' because these societies fail to internalise sexual prohibitions. He then suggests that Western societies belong to the first group while societies where veiling exists belong to the second.⁹⁴

Murdoch's assertion holds true for Western women who despite the liberal attitudes and the use of liberal dress can still be modest without having to build an external barrier as a preventative measure. It would also hold true for those Muslim women who do not veil and despite that they can still be as modest as those who are veiled, as they have internalised modesty. Otherwise veiling would suggest that only those who engage in the practice are modest. Such sentiments are expressed by many women who have been the subject of research on veiling, for example in a study carried out by Wagner et al some of the respondents were convinced that their stature and posture are enough to incorporate their identity and rebuff a condemning gaze with some of them stating: 'My eyes have modesty...why should I cover them?'⁹⁵

In verse 24:31 the Arabic word 'khimar' is used which has been translated to mean a head covering and the verse has to be read in context, as women prior to the revelation of this verse during the jaliyah period would be seen in public with their head coverings deliberately tied back in a manner whereby they would expose their neck and chest. They would also have their hair exposed and wore jewellery that would dangle particularly anklets that jingled as they

⁹³ Fatima Mernissi, *Beyond The Veil: Male-Female Dynamics in Muslim Society* (Al Saqi Books 1985) 27

⁹⁴ George Peter Murdoch, *Social Structure* (Forgotten Books 2013 (Original work published pre-1945, year unknown)) 273

⁹⁵ Wolfgang Wagner and others, 'The Veil and Muslim Women's Identity: Cultural Pressures and Resistance to Stereotyping' (2012) 18 *Culture & Psychology* 521, 533

walked, all with aim of attracting male attention. These immodest practices during this period have been attributed to Arabia being a 'God-less region' which none of the more advanced religions had managed to penetrate.⁹⁶ The verse thus directly addressed this aspect of a woman's behaviour and is understood by Muslims as mandating the covering of the neck, chest and the hair. For this reason the verse is understood to impose requirements of hijab in the form of head dress and not the veil, and has been supplemented further with a number of Hadiths corroborating the requirement of the hijab.⁹⁷

The hermeneutic deficit in the hijab verses

There are two suras in the Qur'an discussed earlier in this chapter, which have been interpreted and propagated by Islamic Scholars to justify a general obligation to veil for Muslim women.⁹⁸ The interpretations and readings of these passages by conservatives is considered by many Muslims as giving fathers, brothers and husbands the right to impose covering obligations, which include a number of models from the simple headscarf, to a complete burqa and in some cases even covering the hands by using gloves. The coverings are justified by men on the grounds that the conservatives have held that women's bodies lead to sexually corrupting men and that necessitates their concealment from men. These views originated from the classical exegetes whose own opinions on the issue of women's bodies were in a state of flux. For example Barlas cites al-Tabari who was of the opinion that men and women could expose parts of their bodies that were not shameful, whereas al-Baydawi was of the opinion that the entire body of a free woman was shameful and eye contact with the opposite sex was a messenger of fornication.⁹⁹ Stowasser gives the example of al-Khafafi who decreed that that the face and the hands of a female required concealment.¹⁰⁰ Such male orientated interpretations are a major concern for women who wish to enjoy equality, as Hussain staunchly asserts:

No matter how many socio-political rights are granted to women, as long as these women are conditioned to accept the myths used by theologians or religious hierarchs to shackle their bodies, hearts, minds, and souls, they will never become

⁹⁶ Karen Armstrong, *Muhammad: A Western Attempt to Understand Islam* (Gollancz 1991) 55

⁹⁷ Sahih Bukhari Volume 001, Book 008, Hadith number 368; Abu Dawud Book 27. Clothing; Abu Dawud Book 27. Clothing. This Hadith is commonly cited by Islamic scholars who are of the opinion that the full face veil is not obligatory in Islam

⁹⁸ Surat Al Azhab 33:59; Surat Al Nur 24:30/1

⁹⁹ Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2003) 55

¹⁰⁰ Stowasser, *supra* (n 73) 27

fully developed or whole human beings, free of fear and guilt, able to stand equal to men in the sight of God.¹⁰¹

The disparity of views led to different forms of covering that included covering the face, head, and hands and feet and is the reason why there is a lack of true consensus amongst Muslims as to what form of covering is obligatory and what is not? But the interpretations did not stop with just body coverings, but extended to total domestic segregation in some Muslim societies such as Saudi Arabia and Afghanistan. In such states women are still subject to severe punishments even in present times if they are found to be mixing with male strangers or fail to abide by Islamic dress codes, this is even though there is no cogent evidence of the existence of such penalties in Islamic history. None of these forms of covering were injunctions, teachings or punishments of the Qur'an, but rather the inscription of the female body, not by divine injunction but individual opinion of exegetes conditioned by a patriarchal society. Such opinions ignore the Qur'anic teachings stipulating that gender relations in Islam are based on equality with women having positive rights in terms of divorce, inheritance and the right to freedom from forced marriage. Furthermore, the Qur'an does not forbid education or employment of women and there are many examples of Muslim female leadership, conducting of trade and business in history and modern times, a good historical example being that of Prophet Mohammed's wives Aisha and Khadija. Some women have gained powerful positions leading states such as Indonesia, Turkey, Pakistan and Bangladesh. Despite such examples, the male orientated opinions serve only to further misogynist views and practices of those who fail to acknowledge the gender equality stipulated in the Qur'an and want to hang on to norms which are a by-product of pre-Islamic culture. Although there are some problematic passages in the Qur'an, its egalitarian core is explicit¹⁰² and it cannot be used to subjugate Muslim women. Muslim scholars have resisted any attempts at re-interpretation using contextual approaches, particularly by women and those that recognise and attempt to remedy the inequalities against women.

The verses in the Qur'an are specific in nature and are highly contextual but the classical exegesis suggests there was intent to generalise the application without distinguishing the addressees of the first verse, and ignoring its historic specificity. This flaw in interpretation has

¹⁰¹ Riffat Hussain, 'Muslim Women and Post Patriarchal Islam' in Paula M. Cooley, William R. Eakin and Jay B. McDaniel (eds), *After Patriarchy: Feminist Transformations of the World Religions* (Orbis 1991) 43

¹⁰² Ziba Mir-Husseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32 *Critical Inquiry* 629, 633

been perpetuated through the centuries and is still being upheld by the Muslim population at large, who have placed blind reliance on the decontextualized meaning attributed to the veil. The verses are clearly addressed to the Prophet with a specific purpose. The revelation of the verse with the prophet being the addressee himself therefore does not have general application for all men in time and space to force their mothers, daughters or wives to comply. This compulsion is contrary to Islam as the Qur'an clearly states that 'There is no compulsion in religion'.¹⁰³ Even the prophet did not have the right to enforce the Qur'anic injunctions using the force or threats in order to achieve compliance.¹⁰⁴ Yet force and threats have indeed been carried out by amongst others, the Saudi Arabian, the Taliban and the Iranian regimes against women who refuse to comply, as well as psychological influence exerted by fathers, brothers, husbands and the community against those women who reside in Western states.

When looking at the verses with a view to establishing the exact form of covering mandated, their requirements are dissonant to those propelled by conservative Muslims. For example, the use of the word jilbab, which is a cloak that covers the body and the khimar, which is a shawl both of which in ordinary usage of the attire cover the juyub, meaning the bosom and the neck. Neither of these items of clothing was historically or customarily used to cover anything other than the body or the neck of a woman. There are many Hadiths that reflect that,¹⁰⁵ yet they are seldom referred to in debates relating to the compulsory nature of veiling. To strain the ordinary meaning of the verses in order to compel covering a woman's face by conservative scholars such as Memon Madani,¹⁰⁶ is not only out of tune with ordinary rules of interpretation but even goes against the grain and spirit of the language used in the Qur'an. Such patriarchal interpretations of the Qur'an contain what I term a *hermeneutic deficit* that warrants a renewed approach, which is based on re-interpreting of those verses of the Qur'an that have been used by conservative Muslim scholars to obligate women with full covering of the face and seclusion. This will lead to eliminating the gap between the normative dress requirements outlined in the Qur'an and the prevalent covering practice among Muslims, both as societies in the Muslim world and as communities in the West.¹⁰⁷

There is a lack of evidence that women are mandated by the Qur'an to cover their faces, even during Hajj, the most sacred of pilgrimage in Islam when in the presence of millions of men,

¹⁰³ Surat Al-Baqarah 2:256

¹⁰⁴ Barlas, supra (n 99) 55

¹⁰⁵ Kamillah Khan, *Niqaab: A Seal on the Debate* (Dar Al Wahi 2008) 23

¹⁰⁶ Madani, supra (n 72)

¹⁰⁷ Jamal Badawi, *Gender Equity in Islam* (American Trust Publications 2003)

women perform the rituals without a face covering.¹⁰⁸ During Hajj women are freely moving around men where bodily contact during some rituals such as the circumambulation¹⁰⁹ of the Kaaba in Mecca is inevitable as more than three million Muslims undertake the ritual. If women had the ability to lead men to succumb to sexual weakness, then one would expect a requirement that all women would be veiled in order to prevent such an attack on men's weaknesses during a 'once in a lifetime' sacred pilgrimage. And if during such an important and faith enhancing act women are not considered dangerous without a veil, then how can they pose such dangers on a day to day basis?

Those who believe that the face veil is compulsory use this negative obligation to argue that, as there is an Hadith to the effect that women must not veil during hajj means that full facial veiling must be the default position. However, this argument lacks the veracity as the direction from the Prophet referred to by the Hadith may simply have been to the effect that veiling was not a religious requirement and he was highlighting that. Another rebuttal can be that there is not an authoritative Hadith that states with clarity that facial veiling is compulsory¹¹⁰ and if God had commanded or wanted women to cover their faces, then the Qur'an would have made that obligation quite specific and with the simplicity of language that leaves little room for error.

It is also apparent that the purpose behind the two cited verses is also different; the first verse does not require women to hide themselves using the jilbab but to make the believing women more visible and thus recognisable. According to Barlas, the Qur'an 'mandating the jilbab explicitly connects it to a slave-owning society...[where] only in a slave –owning jahili society, then does the jilbab signify sexual non-availability, and only then if jahili men were willing to invest it with such meaning'.¹¹¹ The jilbab was thus used as a marker of identity and sexual promiscuity of non- Muslim men at a time when there was no state protection and women had to fend for themselves in terms of protection. Islam in those times was in its infancy and its survival very much depended on treaties and local agreements and it was important for the Prophet to maintain delicate societal relationships.

¹⁰⁸ Hajj is the annual pilgrimage to Mecca which every Muslim is obligated to perform at least once in their lifetime.

¹⁰⁹ The act of moving around a sacred object. During Hajj every Muslim must walk around the Kaaba seven times in a counter clockwise direction

¹¹⁰ Ismail, supra (n 66)

¹¹¹ Barlas, supra (n 99) 56

In the modern state however, slavery has been long abolished and men do not generally gather in the public square awaiting women who would be prey to their sexual desires without any punishment being meted for such actions.¹¹² European states have comprehensive state laws that protect women from any form of public harassment and offences of a sexual nature are treated as having aggravated features attracting harsh punishments. The status of women has improved since the accession of the Qur'an, thereby eliminating the need for women whether Muslim or otherwise to have a marker of identity to denote as being untouchable, therefore Muslim women do not need to wear the jilbab for that purpose. But Instead of confining the jilbab verse to history, the textual interpretations by conservative scholars have re-assigned the jilbab verse to the notion of the dangerous body of the female that leads men astray. Rather than controlling men who may or may not have sexual desires motivated towards a Muslim woman, the women are compelled to conceal themselves. This meaning is remote from the Qur'an and even the second verse obligates the lowering of the gaze and modesty by both sexes is not premised on such a view. In this respect Barlas citing Levi considers the veil as being less a piece of clothing but more of a 'sexually moral and modest praxis on the part of both the sexes, in contrast to their allegedly flaunting manners in the jahaliya'.¹¹³

Attributing female immorality and inferiority to a woman's body, leads those who do not challenge the patriarchal exegesis to impose the veil on women, under the pretext that, it is divine obligation. And those women, who without question internalise that meaning, become objects of that oppressive reading, a view echoed by many defenders of the veil and theorists of female oppression. According to Barlas this 'perversion' of the Qur'an's teachings results in ignoring the critical issue of what constitutes sexually appropriate behaviour for men.¹¹⁴ The question women should be challenging is why they need to defend themselves from sexual abuse when they are living in European societies where national laws afford them protection from all men, with double protection from Muslim men as they are bound by Islamic rules on modesty? The argument that veiling prevents women being corrupted into liberal societies thus becomes extreme at one end of the continuum, as that would have to be based on a

¹¹² Although slavery has been abolished, that does not mean that it has disappeared in practice as it has taken the form of sex trafficking and exploitation at global and national level. For example the United Kingdom Parliament is currently proceeding with the Modern Slavery Bill 2014-15 aimed at curbing and criminalising human trafficking and sexual exploitation

¹¹³ Barlas, supra (n 99) 56

¹¹⁴ Ibid 57

troubling assumption that the jahaliya ethos still persists in Western societies, when at the other end is the equally extreme restriction on contact with Muslim men on equal terms.

Veiling is not the defence women ought to use in order to counter the two extremes, as Western societies have positive laws for that protection, and the divine laws imposing modesty requirements should protect them from Muslim men without the need for covering. The directive in the jilbab verse was a response to a specific aim¹¹⁵ and did extend to male or socially-imposed restrictions on the grounds that women are sexually depraved and are easily provoked and out of control.¹¹⁶ Sherif argues that most Qur'anic provisions were aimed at social conditions prevailing to Arab society fourteen hundred years ago and to treat them as binding today would be in many cases lamentable anachronism.¹¹⁷ Similarly Cragg points out that the spread of the Qur'an over a period of 23 years was gradual and thus its verses impinge upon a succession of temporal events and to make the Qur'an 'immune from history is to make its own history irrelevant',¹¹⁸ and failure by Muslims to 'reckon with moving time, however transforms the incidentalism of the days of the Qur'an into the fundamentalism of the centuries, an approach that does a disservice to Islam'.¹¹⁹

The re-interpretive approach aligns itself with feminist strategies of dealing with existing texts and requires re-reading even if it means against the grain. The re-reading does what good criticism is supposed to do and look at religious texts with a different pair of spectacles. These spectacles would indeed provide a new education for women and would be different in the sense that it will educate women not in what to think but how to. The readings against the grain will allow counterbalancing the conservative readings by alternative interpretations within those traditions. This will not only provide resistance to patriarchal readings but minimise the hermeneutic deficit leading to an alternative to the male gaze through which the traditional interpretations have been made and propagated.

The veil as a deflector of the male gaze

The male gaze often characterised as male phallic or scopic activity has been the subject of extensive feminist critiques and some emphasise the 'mastery of the gaze' which has allowed

¹¹⁵ Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press 1982) 5

¹¹⁶ Mernissi, *Beyond The Veil: Male-Female Dynamics in Muslim Society*, supra (n 93)

¹¹⁷ Faruq Sherif, *A Guide to the Contents of the Quran* (Ithaca Press 1985) 4

¹¹⁸ Kenneth Cragg, *The Event of the Quran: Islam in its Scripture* (Oneworld 1994) 115

¹¹⁹ Ibid

men to 'eye up' a woman.¹²⁰ Feminists are critical of gendered gazing and being gazed at¹²¹ and believe that although observation is conditioned by perspective and expectation, gender plays a role in formulating those expectations. They insist 'these expectations are disproportionately affected by male needs, beliefs and desires' and they object to seeing the world through male eyes as; they 'equate the male gaze with patriarchy'.¹²² This leads to women judging themselves in accordance with internalised standards of what pleases men. Bartky notes that girls 'learn to appraise themselves as they are shortly to be appraised'¹²³ and the men are empowered just like spectators and women are objectified as the seen rather than those who see.¹²⁴ The concept of the male gaze is also associated with art,¹²⁵ cinema, advertising¹²⁶ and even pictorial representation on Greek Attic vases.¹²⁷ It is not simply a male orientated phenomenon, but has pervaded to women too.

Muslims believe that the male gaze if not deflected can lead to sexual encounters, which are forbidden in before marriage in Islam and anything that may lead to attracting the opposite sex for sexual purposes would also be prohibited. Activities such as wearing seductive clothing that attracts attention, meeting men alone and reading or watching obscene material would fall under this prohibition.¹²⁸ According to Al-Qaradawy Islam stipulates that clothes worn by women must not be revealing, transparent or tight fitting as they would delineate parts of the body that are sexually attractive¹²⁹ and even if modest, perfuming the clothing must not be used to attract attention.¹³⁰ Indeed this suggests that men do not need protection and if that is the case, then a woman must be considered to be a sexual animal whose sexuality needs to be controlled via the means of dress codes. Clearly then Islam fears the power of female attraction over men and the assumption is that the male cannot handle an uncontrolled female sexually, leading to an inference that a woman's sexual capacity is greater than a

¹²⁰ Catherine King, 'The Politics of Representation: A Democracy of the Gaze' in Frances Bonner and others (eds), *Imagining Women: Cultural Representations and Gender* (Polity Press 1992) 134

¹²¹ Frances Bonner and Lisbeth Goodman, 'Introduction: On Imagining Women' in Frances Bonner and others (eds), *Imagining Women: Cultural Representations and Gender* (Polity Press 1992)

¹²² Mary Devereaux, 'Texts, Resisting Readers and the Gendered Spectator: The New Aesthetics' (1990) 48 *The Journal of Aesthetics and Art Criticism* 337, 337

¹²³ Sandra Bartky, 'Women, Bodies and Power: A Research Agenda Philosophy' (1989) 89 *Philosophy and Feminism* 78, 79

¹²⁴ King, supra (n 120) 135

¹²⁵ John Berger, *Ways of Seeing* (Penguin 1972)

¹²⁶ Laura Mulvey, *Visual and Other Pleasures* (Indiana University Press 1989)

¹²⁷ Alison R Shorrock, 'Looking at Looking: Can you Resist a Reading' in David Frederick (ed), *The Roman Gaze: Vision, Power and the Body* (John Hopkins University Press 2002) 283

¹²⁸ Yusuf Al-Qaradawy, *The Lawful and the Prohibited in Islam* (Al Faisal Press 1992) 28

¹²⁹ Ibid 87

¹³⁰ Al Albani and Mohammed Nasr Adeen, *The Jilbab of the Muslim Woman in Quran and Sunnah* (Dar El Salam 2002) 37

man's. According to Mernissi 'The entire Muslim social structure can be seen as an attack on, and a defence against, the disruptive power of female sexuality'.¹³¹

One obvious flaw in the justifications perpetuated by Islamic scholars who assert that men need protection from a woman's sexuality is the question of what protection exists for women from the sexuality of men, as they are neither veiled nor secluded. Can a woman not find a man attractive and have sexual desires that emanate from a man's looks? It is questionable why such a parity question has avoided an appropriate discussion by Islamic scholars who are proponents of veiling. Indeed the polarised view that it is only men who are sexually stimulated by the female body, a visual stimuli and the Freudian concept of scopophilia¹³² applicable to such assumptions is no longer supportable according to recent research carried out in this area. Bergner's study that involved scans of women's brains and their responses to images of an erotic nature showed that the women's responses were much stronger compared to those of men. He concluded from his research that women remained much more controlled in expressing their reactions, thus the window between the reactions to stimuli and the expression of such impulses was greater than that of men, who were much more forthcoming with an acknowledgement of their reactions.¹³³

The greater gap in a sexual stimulus and acknowledgement, or greater control over a reaction is the result of a number of factors associated with women. For example, one reason is the internalisation of modesty as argued by Murdoch who states that the Western women have 'strong internalisation of sexual prohibitions during the socialization processes'.¹³⁴ There is no universal principle that can be applied to all women and their reactions to sexual stimuli are dependent on religious and cultural settings and societal attitudes towards women in those contexts which are constantly changing. A good example being El Feiki's research of sexual attitudes in the Arab world which shows that attitudes towards sexuality are shaped by forces such as politics, economics, religion, tradition, gender and generations rather than any characteristics inherited by birth. According to her any changes are evolutionary via a gradual pushing along the grain of religion and culture, rather than evolutionary and 'they are all part

¹³¹ Mernissi, *Beyond The Veil: Male-Female Dynamics in Muslim Society*, supra (n 93) 45

¹³² Scopophilia means 'the love of looking or watching'

¹³³ Daniel Bergner, *What do Women want? Adventures in the Science of Female Desire* (Canon Gate 2013)

¹³⁴ Murdoch, supra (n 94) 273

and parcel of sexuality – that is, the act and all that goes with it, including gender roles and identity, sexual orientation, pleasure, intimacy, eroticism and reproduction’.¹³⁵

Failure of the veil at averting the male gaze

Since women are deemed stronger at resisting natural instincts, it can be argued that even if the woman does not engage in any eye contact with a man, the face is probably the most visually stimulating feature of a woman and as that is not concealed; it can lead to sexual attraction. Lazreg notes that ‘Men scrutinise women’s faces whether a woman wears a veil or not, for signs of where they stand on sexual matters’.¹³⁶ But the argument suggests Muslim men are going against the Hadith that makes it clear that the first glance is permitted but the second that would be an intentional gaze of a woman due to her beauty is classed as a sin.¹³⁷ The wearing of the veil does not guarantee that the male gaze will be averted; if anything it can attract more attention to a woman. This view is also adopted by Borneman who states that the veil, in short heightens men’s fantasies about women, making it easier to perceive them as a generic category of desirable objects.¹³⁸ His view being based on the notion that the greater the concealment the greater the curiosity and imagination as to what may lie behind the veil. Such a plausible view does mean that the veil does not achieve its objective, as it may even attract attention from men who may not have given that same attention to an unveiled woman, but because the veil generates this curiosity, it attracts such a man.

Lazreg points out that men do, and will scrutinise a woman’s face looking for possible signals of willingness on the part of the woman, further commenting that ‘adultery of the eye and the heart cannot be stamped out by the veil’.¹³⁹ But she fails to acknowledge that it is this precise scrutiny of the woman the above Hadith is aimed at. A man should not gaze with any sexual intent and even if he does and many do not refrain, then the woman should not give the signal or the body language the man is waiting for. If she cannot refrain from these signals then surely the veil is not worn by her for that purpose. Mernissi on the other hand states that the woman when going out in public enters male space and that ‘The veil means that the woman is present in the men’s world, but invisible; she has no right to be in the street’ and that ‘Women

¹³⁵ Shereen El Feki, *Sex and the Citadel: Intimate Life in a Changing Arab World* (Chatto & Windas 2013) xiv

¹³⁶ Lazreg, *Supra* (n 2) 46

¹³⁷ Al Tirmidhi 2701 ‘Allah’s Messenger is reported to have said to Ali who read as follows: Oh Ali [Listen]! Don’t continue with looking [at unlawful items], as the first look is [permitted] for you, while the second is not’

¹³⁸ Borneman, *supra* (n 4) 2752

¹³⁹ Lazreg, *supra* (n 2) 45

in male spaces are considered both provocative and offensive'.¹⁴⁰ It is this latching on to historical misinterpretations of Islamic commandments that lead Islamic scholars into declaring public space to be the domain of the men, which is contrary to the egalitarian nature of the Qur'an. This contributes to gender inequality imposed through culture rather than religion. Mernissi attributes this to Islam itself stating 'desegregation of the sexes violates Islam's ideology on women's position in the social order: that women should be under the authority of fathers, brothers or husbands. Since women are considered by Allah to be a destructive element they are spatially confined and excluded ...'¹⁴¹ But if her view is to be accepted, then it is disturbing that religion should declare the sheer presence of a woman as provocative to a man; an argument often used by those who advocate gender segregation.

If the Qur'anic commandments are mandatory according to male orientated interpretations that demand a blind following and women are to be veiled and segregated. Then the requirement for the verse and its application would be devoid of meaning. The requirement to lower the gaze by both sexes suggests that women are free to enter public spaces, without covering their face as the application of the verse to men would guard their modesty and therefore segregation of women defies the intention of the verse commanding lowering of the gaze. But if prohibiting the male gaze is to enhance morality in men by denying them sight of a women's face, then arguably Muslim men can never be moral and virtuous in a Western society, as despite veiling by Muslim women who may deny the gaze to men and remain invisible, they cannot retain their virtuousness as women of Western cultures would always be visible to them and unveiled.

The modesty doctrine

The argument used most frequently by Islamic scholars and others who support the wearing of the hijab and the veil is that Islam requires modesty from Muslim women and the hijab or the veil is a sign of discharging that duty. But this imposed modesty by men not only prescribes the type of clothing to be worn by Muslim women; it also attempts to modify their characteristics affecting how they will interact with others in public spaces. From what should be a set of internalised values, which everyone is entitled have, Muslim women are expected to externalise them too. The concept of modesty is contested as there are different understandings of its nature and whether the doctrine objectifies women whether Muslim or not. There are several definitions of modesty found in various dictionaries that include aspects

¹⁴⁰ Mernissi, *Beyond The Veil: Male-Female Dynamics in Muslim Society*, supra (n 93) 143

¹⁴¹ Ibid 19

such as humility, shyness or simplicity. The Oxford Dictionary defines modesty as ‘behaviour, manner, or appearance intended to avoid impropriety or indecency.’¹⁴² Modesty is not confined to such qualities, as a person can possess other positive characteristics such as self-esteem, self-expression and autonomy. Neither is it limited to Islam or clothing alone; it can be deployed in life generally since values such as humility and simplicity are valued attributes. These values are clearly mentioned in the Bible¹⁴³ where head coverings such as the veil were customary for Jewish women to wear when going out in public and according to Brayer ‘During the Tannaitic period the Jewish Woman’s failure to cover her head was considered an affront to her modesty. When her head was uncovered she might be fined four hundred Zuzim for this offense.’¹⁴⁴ Punishments for failing to follow modesty codes are also believed to be contained in the Qur’an, indicating how important the honour of the woman is considered by some Muslims and punishment for those who dishonour a woman are severe.¹⁴⁵

Even laws in contemporary liberal societies such as in the USA compel the requirement of modesty; they are deemed constitutional. For example, nudity in public places is prohibited and any mode of public undressing that can be classed as obscene or indecent, even including prohibitions at one point on public breast-feeding.¹⁴⁶ Modesty relating to sexuality is based on traditional morality and considered an ethical virtue shared by the major religious traditions, classed as a positive character trait. Hence Allen states ‘There is a close reciprocal connection between chastity and sexual modesty. Failures of sexual modesty are a threat to pre-marital chastity.’ She further refers to Tocqueville who speculated that ‘nineteenth century American

¹⁴² <http://oxforddictionaries.com/definition/english/modesty>

¹⁴³ Collosians 3: 12 (NLT) “Since God chose you to be the holy people he loves, you must clothe yourselves with tender hearted mercy, kindness, humility, gentleness, and patience” and 1 Timothy 2: 9-10 ‘And I want women to be modest in their appearance [a] They should wear decent and appropriate clothing and not draw attention to themselves by the way they fix their hair or by wearing gold or pearls or expensive clothes. For women who claim to be devoted to God should make themselves attractive by the good things they do.’

¹⁴⁴ Menachem M. Brayer, *The Jewish Woman in Rabbinic Literature: A Psychosocial Perspective* (Ktav Pub Inc 1986) cited in Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Routledge 2012)

¹⁴⁵ Sura Nur 24:4 ‘And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - They indeed are evil-doer’.

¹⁴⁶ Not all legal systems take a strict view on modesty. An interesting attack on age old principles of modesty was challenged successfully when Ireland’s High Court ruled that the criminal offence of ‘offending modesty’ was unconstitutional on the basis that it was ‘hopelessly vague’ and ‘contained no clear standard of conduct prohibited by law and lacked ‘any clear principles and policies’; Aodhan O’ Faolain, ‘Prosecutions for men accused of ‘exposing themselves’ will not go ahead following High Court ruling’ *Independentie* (Dublin, 9 April 2014) <<http://www.independent.ie/irish-news/courts/prosecutions-for-men-accused-of-exposing-themselves-will-not-go-ahead-following-high-court-ruling-30171191.html>> accessed 10 April 2014

women were chaster than their European counterparts...because they tended to seclude themselves inside their homes after marriage.' For Allen:

Sexual modesty is a moral virtue, not one that always requires old fashioned chastity or head covering scarves. Modesty is a value feminists have properly urged societies to question and historically, it has been of a piece with repressive traditions of female privacy that feminist have disavowed.¹⁴⁷

Not all women, particularly some feminists adopt the view that modesty is such a positive value for women. There is a continuing debate questioning the objectification element associated with modesty and immodesty.¹⁴⁸ However there are also calls for a greater revival of pre-marital chastity by pro-modesty feminists such as Shalit, who questions some of the current views noting that 'In this post-sexual revolution era, a young woman may freely cohabit, but she may not choose to wait. If she does, there must be something wrong with her'¹⁴⁹ and attributes them to misogyny 'the view that for all of world history women have been idiots, or the view that gives women more credit, and thinks we have only gone overboard in the blip of the last thirty years'.¹⁵⁰

However some feminists see modesty as being oppressive to women using the argument that modesty is not about fashion, nor about protecting women but about the female body being controlled, which men seem to think they are entitled to in order to maintain their privileged position of power over women, exerted but regulating the ways which women use their bodies and think about them. They further argue that it is not about women feeling comfortable in wearing clothes that signal 'touch me not' message nor is it about a woman's agency associated with how she will dress or how she will present herself to others; it is about what men feel comfortable with.¹⁵¹

¹⁴⁷ Anita L Allen, 'Disrobed: The Constitution of Modesty' (2006) 51 Villanova Law Review 841, 857 <<http://heinonline.org>> accessed 3 July 2013

¹⁴⁸ Leslie A Hahner and Scott J Varda, 'Modesty and Feminisms: Conversations on Aesthetics and Resistance' (2012) 24 Feminist Formations 22

¹⁴⁹ Wendy Shalit, *A Return to Modesty: Discovering the Lost Virtue* (Pocket Books 2000) 180

¹⁵⁰ Ibid 216

¹⁵¹ Shari I. Dworkin and Leslie Heywood, *Built to Win: The Female Athlete as Cultural Icon* (University of Minnesota Press 2003); Kellie Bean, *Post-Backlash Feminism: Women and the Media Since Reagan/Bush* (McFarland & Co 2007)

The blaming of the woman is a deeply entrenched attitude in patriarchy that often sees the woman's sexuality as being dangerous, a view prevalent amongst many men. According to Barry 'Women have been led to believe for so long that they have an uncontrollable sexuality which victimizes men and makes females innately promiscuous, a myth that we must believe at the same time that we believe all women are frigid'.¹⁵² This clear 'double bind' faces women who on the one hand are seen as sexual objects, but on the other they are shunned and shamed for an expression of any kind of sexuality. The view formed in the patriarchal mind is that women would only wear revealing clothes because they want to entice men. A natural question that arises is what is wrong with women seeking sexual attention from men? When men are allowed to do it is acceptable but if a woman does that she is considered immodest. For example if a man was to walk around with only his shorts he is not considered to be giving a signal of 'sexual availability' but a woman who wears skimpy clothing is considered as immodest and an invitation to be objectified. This is exactly what needs to change if women are to be considered of truly having freedom to dress the way they want to, without women's bodies and clothing being used as markers of sexuality. According to Gillen and Montemurro:

The right to display one's body as an authentic expression of sexuality through the use of revealing clothes is a very limited one, restricted more to theory than practice. In theory, a sexy and desirable woman is one who wears clothes that display or accentuate a toned curvaceous body. In practice, a woman who dresses in such a manner is usually judged negatively for such presentation.¹⁵³

However this overlooks the fact that some women may actually feel good about and confident about their bodies. It could also be their aesthetic instead of a cultural fear of their sexuality and can be considered 'as an act of resistance and an articulation of their subjectivity'.¹⁵⁴ But women get caught out with competing ideologies, on the one hand there is pressure on young women to 'dress up and look hot' but on the other those who are aged run the risk of being labelled as promiscuous if they dress hyper sexually. According to Gillen and Montemurro, who carried out a study into impressions given off by sexualised clothing the 'balance between authentic embodied representation of sexuality and conformity to heteronormative standards

¹⁵² Kathleen Barry, 'The Vagina on Trial: The Institution and Psychology of Rape' Women Against Rape <<http://www.uic.edu/orgs/cwluherstory/CWLUArchive/vaginatrial.html>> accessed 11 April 2014

¹⁵³ Beth Montemurro and Meghan M. Gillen, 'How Clothes Make the Woman Immoral: Impressions Given off by Sexualised Clothing' (2013) 31 Clothing and Textiles Research Journal 167, 168

¹⁵⁴ Ibid 169

for desirable appearance becomes quite complex and nearly impossible to manage'.¹⁵⁵ Some of the respondents in their research maintain that clothing considered immodest by some may 'actually represent women's taste and preference' and question the assumption that women who dress in sexy clothes just want to have sex:

It's not like women dress like that just to have sex. They are just dressing like that, because maybe they just want to wear [those clothes]. But men think they're like the sexual beings that they're going to have sex with this woman that's dressed provocatively.¹⁵⁶

Similarly Wilkins asserts that Goth women who choose to dress provocatively and are proud of their sexuality, just like some women who dress in sexy clothes because it feels good to them.¹⁵⁷ The inference then is not difficult to draw that by imposing dress restrictions by the patriarchal forces is an attempt to desexualise women. There are those who are of the opinion that this objective is far from being fully achieved, as women do think about sex, more than men as recent studies have shown.¹⁵⁸ Indeed there are feminists such as Camille Paglia considered 'a veteran of pro-sex feminism who still endorses pornography and prostitution' on the ground that it is a true exercise of their choice and autonomy.¹⁵⁹ But equally there are those such as MacKinnon and Dworkin who vehemently attack the use of women in the sex trade as objectification and violence against women, which harms them.¹⁶⁰

Objectification and veiling

One argument over the Islamic veil imposed by modesty doctrines is that it results in objectification of Muslim women as 'it encourages people to think of and treat women as a mere object'.¹⁶¹ Objectification in this context means treating women as objects for the viewer's benefit with the focus on physical beauty or indeed lack of it in the case of the veil, by denying visibility of it, making it a concern central to feminist theory. Nussbaum in her work

¹⁵⁵ Ibid 170

¹⁵⁶ Ibid 174

¹⁵⁷ Amy C. Wilkins, 'So Full of Myself as a Chick': Goth Women, Sexual Independence, and Gendered Egalitarianism' (2004) 18 *Gender & Society* 328

¹⁵⁸ Bergner, supra (n 133)

¹⁵⁹ Hahner and Varda, supra (n 148) 31

¹⁶⁰ Catharine MacKinnon, *In Harm's Way* (Catharine MacKinnon and Andrea Dworkin eds, Harvard University Press 1998)

¹⁶¹ Martha Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Harvard University Press 2013), 114

identifies seven features,¹⁶² with Langton¹⁶³ adding another three to her list¹⁶⁴ that could be at play when a person is being treated as an object.¹⁶⁵ She clearly demonstrates that objectification as a concept is not just confined to appearance of women; the range of application being quite wide in relation to women's appearance. Bartky points out that women tend to be valued based on their looks and are associated with their bodies more than men, and to a greater extent,¹⁶⁶ whilst Saul reminds of the constant social pressure on women, to maintain or correct their body so it conforms to norms of feminine standards.¹⁶⁷ There are trends that men are also now becoming pre-occupied with appearance and want to be appealing to women, but that is considered an accentuation of the problem rather than a move in the right direction.¹⁶⁸

Bartky draws an analogy with the Marxist theory of 'alienation' where for Marx the labour being a distinct human activity and the product of the labour being the externalised to the worker's being. But under capitalism the workers are alienated from the product of their labour, leaving the worker as a person fragmented. She is of the opinion that in patriarchal societies, women get fragmented due to being too closely associated with their body and their 'entire being is identified with the body, a thing...regarded as less inherently human than the mind or personality'. Therefore as all the focus is placed on her body, her other attributes such as personality or mind is ignored, leaving a woman's person fragmented. And it is through this fragmentation that a woman gets objectified because her body has been separated from the person and is understood by men as representing the woman.¹⁶⁹

Bartky's view is commonly voiced by Muslim women who cover, for example Nadia who is one of the respondent's in Bullock's research on veiling and the associated stereotypes states 'I'd like people to judge me for the person I am and not be caught up in how I look'.¹⁷⁰ Similarly some of Droogsma's respondents cover for the same reasons as Mona states '...I feel like by wearing the hijab, the only people who see all of me are the people who know me

¹⁶² Instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity

¹⁶³ Rae Langton, *Sexual Solipsism* (Oxford University Press 2009) 228

¹⁶⁴ Reduction to body, reduction to appearance and silencing

¹⁶⁵ Martha Nussbaum, 'Objectification' (1995) 24 *Philosophy and Public Affairs* 249, 257

¹⁶⁶ Sandra Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge 1990)

¹⁶⁷ Jennifer Saul, *Feminism: Issues and Arguments* (Oxford University Press 2003) 144

¹⁶⁸ Susan Bordo, *Unbearable Weight* (University of California Press 1993); Saul *ibid*

¹⁶⁹ Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression*, *supra* (n 166) 130

¹⁷⁰ Bullock, *supra* (n 25) 234

intellectually, emotionally, you know what I mean?...So people can't objectify me to the point where they would be able to, possibly, if I chose to dress a different way'.¹⁷¹ And Hadia affirms that 'hijab is telling men that they don't have the rights to look at my body and to judge my beauty. It forces men to look beyond just the physical and to see who you are'.¹⁷²

Since objectification generally involves two people, veiled women in patriarchal societies can be considered akin to Bentham's prisoners of the Panopticon.¹⁷³ As immodest women feel they need to please the man by being sexually appealing and the veiled woman feels she needs to deflect the male gaze of the man by covering herself, both women are adapting their appearance for the sake of others. In both cases the end result is self-objectification because some non-Muslim women are constantly being reminded of their femininity, checking their make-up and dress, whilst the veiled Muslim woman is constantly checking the positioning of the veil and being reminded by religious scholars, parents, husbands and the community about the importance of it. The consequence being that the actions for both types of women become voluntary in the sense that they have internalised it leading to self-objectification. Indeed this does not apply to all women, as there are Muslim and non-Muslim women who ignore and do not succumb to such pressures neither are they instigated by anyone.

The objectification theory is clear on the infliction of great damage to the woman by self-objectification¹⁷⁴ occurring, leading to internalisation of the male gaze¹⁷⁵ with the woman becoming the aesthetic and the object of the male gaze, which in turn leads to an imbalance in power between the gazer and the object. Hence the two elements being described as the institutions displaying gender inequality.¹⁷⁶ This is contrary to the ideals or the egalitarian nature of the Qur'an, for example men and women's relationship with God is on equal footing where both are believed to be awarded identical rewards and punishments for their deeds. Although the relationship between men and women is defined by the Qur'an, affording women varying degrees of rights recognised under Islamic law, the pre-Islamic cultural gender differences seem to permeate the Islamic textual interpretations, leading to liberal Islamic

¹⁷¹ Rachel Anderson Droogsma, 'Redefining Hijab: American Muslim Women's Standpoints on Veiling' (2007) 35 *Journal of Applied Communication Research* 294

¹⁷² *Ibid* 305

¹⁷³ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Pantheon Books 1977) 202

¹⁷⁴ Barbara Frederickson and Tomi-Ann Roberts, 'Objectification Theory: Toward Understanding Women's Lived Experiences and Mental Health Risks' (1997) 21 *Psychology of Women Quarterly* 173

¹⁷⁵ Rachel M Calogero, 'A Test of Objectification Theory: The Effect of the Male Gaze on Appearance Concerns in College Women' (2004) 28 *Psychology of Women Quarterly* 16

¹⁷⁶ Frederickson and Roberts, *supra* (n 174) 173

scholars and some Muslim feminists highlighting the teachings of equality in Islam, to attenuate and eliminate gender power imbalances.

If immodest dress results women in becoming objects of pleasure as opposed to free thinking and independent women, then the opposite reaction to this being modesty, also objectifies women as the focus on both, is the female body, thereby emphasising its importance. The more it is regulated the more obsessive it becomes and instead of eliminating sexualisation of the female body, modesty simply contributes to it. Such dangers are evident by comments made by Rabbi Dov Linzer quoted when referring to an attack by a group of Orthodox Jews in Jerusalem who spat on an eight year old girl accusing her of being immodest:

The modesty obsessed gaze is looking at sexual objects not at a human being. Those men who spat on that girl saw her not as a little innocent girl like decent human beings would but as a sexual object that offended them. This is not out of concern for temples (the body) or for women in general, it is out of misogyny. When a man is offended by a woman's revealing clothing it is because he sees her as a sexual object, not a person with desires, dreams, plans ambitions; she is simply a series of sexual objects.¹⁷⁷

If one of the aims of the veil is to oppose objectification and gain equal recognition, for example as the Iranian women who decided to veil in order to reject Western models of 'emphasised femininity with their sexual objectification of women... and replaced [them] by a combative model of femininity'.¹⁷⁸ Then covering women's feminine attributes may be congruent with that aim, but hiding a woman's face or the head leads to elements of a woman's personality without any sexual function being concealed too, resulting in an anti-objectification strategy becoming a tool of objectification. As Botz-Bornstein a lecturer at a Gulf University says 'In my classes I have more difficulties memorizing the names of my veiled students because, to me, many look very much alike'.¹⁷⁹ Thus the resistance via veiling becomes more an issue of appearance of, rather than being an object of desire that cannot be touched. It is possible that this can be attributed to false consciousness, but can also mean

¹⁷⁷ Quoted in: Hannah Wheelwright, 'Policing Modesty' (*Young Mormon Feminists*, 2013)

<<http://youngmormonfeminists.org/2013/04/06/policing-modest/#more-3273>> accessed 11 April 2014

¹⁷⁸ Minoo Moallem, 'Transnationalism, Feminism, and Fundamentalism' in Caren Kaplan, Norma Alarcon and Minoo Moallem (eds), *Transnationalism and Fundamentalism* (Duke University Press 1999) 330

¹⁷⁹ Thorsten Botz-Bornstein, 'Can the Veil be Cool?' (2013) 25 *The Journal of Religion and Popular Culture* 249, 259

that even though it uses the male language against the male, it also has the ability to unconsciously adopt the male language resulting in self-objectification. The veil as a piece of cloth may hide the sexualised image, but beneath it lays her continuing objectified personality. Therefore an unintended consequence of the veil can be an emphasis on, rather than concealing the Muslim woman's body.

Why is modesty so important in Islam?

Modesty is considered so important in Islam that Muslims believe that its absence can lead to a person to become a disbeliever and engage in sinful behaviour.¹⁸⁰ Such condemnation and fear of being labelled sinful is precisely the type of influence that coerces women into veiling, whereby choice is bypassed because such women will not have any choice if they are considered prone to becoming disbelievers or sinful. Mernissi referring to the writings of Ghazali notes that 'a man can do as much damage to a woman's honour with his eyes as if he were to seize hold of her with his hands'.¹⁸¹ But this suggests that the only way for women to remain honourable is to totally disappear from public space, thus giving cogency to arguments presented by traditionalist Muslim scholars such as Maududi, who has argued for complete gender segregation for Muslims when out of the private realm.¹⁸²

Islamic ethics considers modesty as more than just a question of how people dress and express their modesty in front of people; rather it is reflected in a Muslim's speech, dress, and conduct in public or private in regards to God. Any talk of modesty, therefore, must begin with the heart, not the hemline, as the Prophet of Mercy is believed to have said, 'Modesty is part of faith, and that part of faith must lie in the heart'.¹⁸³ Muslims, like conservatist Christians and orthodox Jews are not only required to be modest in front of other individuals, but have to be modest before God too and this is where the link between modesty and faith has an important meaning. The Hadith guides Muslims on this aspect 'Avoid being naked, for with you are those who never leave you...so observe modesty before them and honour them'.¹⁸⁴ The phrase 'those who never leave you' may appear strange to non-Muslims, but Muslims believe the presence of God and the angels¹⁸⁵ remain with them throughout their lifetime and even in the

¹⁸⁰ "The Prophet Mohammed said: 'If you have no shame, do as you wish' (Al Bukhari)

¹⁸¹ Mernissi, *Beyond The Veil: Male-Female Dynamics in Muslim Society*, supra (n 93) 141

¹⁸² Maududi, supra (n 70)

¹⁸³ www.Islamreligion.com/articles/21/modesty

¹⁸⁴ Al-Tirmidhi 3115

¹⁸⁵ Muslims believe there are two angels assigned to every person, whose function is to record every good and bad deed of that person

absence of other people they must still remain modest. Armstrong notes this point stating that:

Muslims have a very pervasive 'God Consciousness', making them highly aware of the invisible and the omnipresence of Allah and the focus on God and as a consequence, the afterlife, makes for a very different way of looking at the world from that most common in Western societies.¹⁸⁶

Such an approach is based on the assumption that everyone follows Islamic teachings or they are bound by the same modesty doctrines, which is clearly not the case as Muslims cannot even agree on whether the veil is obligatory or not. It is not uncommon to find people who possess positive values analogous to those of faith, yet they do not fit in with the requirements of modesty as propagated by religion. For example nudists come from all walks of life and to suggest that they have negative values or beliefs would be an affront to them. It can be argued that naturalists are more in tune and feel comfortable with their bodies and think less of it in sexual terms and their children think less of it in those terms whilst growing up. They are also less likely to engage in activities forbidden by the mainstream religions, such as masturbation or pornography and live a healthier lifestyle as they are able to suppress or control their sexual urges, which seems to be a real issue associated with modesty. This can be evidenced by a study carried out by Smith and King in the UK during which they found that practicing naturists often suppressed their sexuality via the use of rules, geographical isolation and control of thoughts and behaviour, with some participants in the research finding additional ways of enjoying their sexuality by keeping feelings hidden.¹⁸⁷

Clothing and modesty

Clothing in Islam and Abrahamic religions is closely linked with modesty but Dunlap's theory contests that relationship arguing that modesty is simply a product of habit, stating that 'As a matter of observable fact, the connection between clothing and modesty is a simple one. Any degree of clothing, including complete nudity is perfectly modest as soon as we become thoroughly accustomed to it'.¹⁸⁸

¹⁸⁶ Karen Armstrong, *A History of God: A 4,000 Year Quest of Judaism, Christianity and Islam* (Ballantine Books 1993) 4

¹⁸⁷ Glenn Smith and Michael King, 'Naturism and Sexuality: Broadening Our Approach to Sexual Well Being' (2009) 15 Health Place 439

¹⁸⁸ Dunlap Knight, 'Development and Function of Clothing' (1928) 1 General Psychology 64, 66

It is evident that there are still many people who are able to control their sexual urges despite a lack of clothing. For example in Ethiopia's Omo valley the four different tribes of Kara, Nyangatom, the Hamar and the Mursi who still remain naked yet their lack of clothing does not cause sexual chaos amongst their men.¹⁸⁹ This suggests as in Dunlap's terms that there is no connection with clothing or modesty 'it is merely the breaking of the established convention which makes it immodest'.¹⁹⁰ For example, amongst certain African tribes if a woman failed to wear a distinctive string of beads around her waist even though she wears no clothes would be ashamed and dishonoured, just as a European or a Muslim woman is likely to.

According to Stimpfl the clothing worn by women can ascend passion over reason and for this reason they must be careful in their choice of dress in order to de-emphasise this erotic potential.¹⁹¹ Whereas some apportion this erotic potential on women suggesting they are predisposed to passion that leads to evoking eroticism.¹⁹² Borneman states that 'while Western feminists may not make the link between inner and outer beauty, certainly the worldwide popularity of the cosmetics industry testifies the importance many women place on outer appearance'.¹⁹³ He further states that the aim of the woman who veils is to remove the gaze from the outer appearance, but questions whether that aim is indeed achieved. He says the veil doesn't prevent objectification but simply slows it down as men still gaze at veiled women if they are able to discern the veiled woman's shape. Indeed there is some weight in this argument as simply covering the face cannot be successful at discouraging male lust and neither can it eliminate the potential of any flirting from the female. It would be dependent upon the individual woman's reason for veiling, if indeed it is for reasons of modesty as some Muslims believe is commanded by Islam, then flirting by women would defeat the object.

Problems with the modesty doctrine

The difficulty with the modesty doctrine in Islamic terms is that it places unjust burdens on some groups of agents compared to others. In Islamic culture, the expectations of sexual modesty are disproportionately placed upon women compared to men and in such situations continued propagation of sexual modesty 'will perpetuate the injustice of these unequal social

¹⁸⁹ Daniel Sullivan, *Tribes of the Omo Valley* (Mutual Publishing 2012)

¹⁹⁰ Knight, supra (n 188) 66

¹⁹¹ Joseph Stimpfl, 'Veiling and Unveiling: Reconstructing Malay Female Identity in Singapore' in Linda B Arthur (ed), *Undressing Religion: Commitment and Conversion from a Cross Cultural Perspective* (Berg 2000) 175

¹⁹² Michael G Peletz, *Reason and Passion: Representations of Gender in a Malay Society* (University of California Press 1996) 221

¹⁹³ Borneman, supra (n 4) 2750

expectations'.¹⁹⁴ A prime example of social injustice resulting from modesty as practiced by veiled women is the limited access to employment or certain public services or prohibition on access to all public spaces as in the case of the French veil ban discussed in part two of the thesis. This is in the sense that modesty poses significant limitations for Muslim women for example those employments that require facial recognition such as school nurseries, the teaching profession, health services and other manual type employments may not be as accessible to women who veil. Such limitations have been confirmed by Syed's study that found that the patriarchal perspective on modesty prevents women in playing a role in a nation's economy, the consequent being that there is an insufficient utilisation of national human resources.¹⁹⁵

If the veil is adopted as a cultural practice or as a form of resistance against a host culture, then arguably the woman is put into a more powerful position as she can gaze at the object, but remain almost invisible herself. This according to Masood puts the woman in a commanding position as she is aware the veil 'denies men their usual privilege of discerning whom they desire and by default the women are in command'.¹⁹⁶ But if Muslim men were to lower their gaze as expected of them by Islam, then irrespective of this transition of power to the woman, they would be in a position to escape her gaze. This therefore reveals a difficulty with virtues stemming from modesty such as the notion that all men are lewd and obsessed with female sexuality. To say that all men who glance at women do so because of sexual reasons is certainly an unfair sexual classification, as there is regular contact between different sexes in Western societies, where males interact with females in a number of social and professional settings without any sexual connotations. Similarly there are Muslim women who do not veil and mix with Muslim men in social and employment settings without upsetting any sexual equilibrium.

There are polarised views on the modesty doctrine that question its values and those who place it within feminism too, in both cases the issue becomes objectification of women. Modesty in the patriarchal sense can sexualise the female body and turn it into a sexual object just as much as pornography or sexually appealing dress does. If wearing provocative clothing puts women's bodies on a stage for men to deliver judgement and approve leading to their self

¹⁹⁴ Scott Woodcock, 'The Social Dimensions of Modesty' (2008) 38 *Canadian Journal of Philosophy* 1, 25

¹⁹⁵ Jawad Syed, 'An Historic Perspective on Islamic Modesty and its Implications for Female Employment' (2010) 29 *Equality, Diversity and Inclusion: An International Journal* 150

¹⁹⁶ Maliha Masood, 'On the Road: Travels with my Hijab' in Jennifer Heath (ed), *Women Writers on its History, Lore, and Politics* (University of California Press 2008) 226

–objectification, wearing the veil or the burqa in order to hide the body for approval and to avoid being sexualised by men does that too. The solution is to allow women to wear exactly what they want without having to fear or hope for the male gaze. If Muslim men perceive women as sexual objects then irrespective of their attempts to hide women away from public space, they will still be kindled by something that reminds them of the sexual. And as they fight to suppress their sexual urges they see women everywhere identifying sexual stimulation with every reminder of a woman, thus pushing women out of the forefront. Suppressing women is not going to achieve modesty as that is making women the victims of men’s inability to restrict their gaze and not looking at a woman in a sexual manner, it has to be men who must control their sexual desires and take control of their gaze and minds. This way women’s deployment of modesty as a form of resistance that attempts to overcome men’s inability may not be required, but such paradigms are not simply confined to women who veil but apply to Western women too.

Conclusion

The meaning of the verses of the Qur’an intended to be of general application and those that had a specific meaning such as the one that applied to the Prophet’s wives and the verse that allowed Muslim women to be identified by their dress to prevent them being harassed has been blurred by Islamic scholars’ interpretations. This is because the specific verses have been given an interpretation that is of a general application thus making them applicable to all Muslim women irrespective of the temporal contexts. This difficulty can be dealt with by adopting a different methodology, whereby the Qur’an in some cases such as veiling must be read historically, paying heed to context rather than chronology and hermeneutically. This will allow substituting contexts of early Islam with contemporary ones and this can only be achieved by reading behind the Qur’an first. Such an approach is consistent with Barlas’, Hussain’s, Wadud’s and Mernissi’s re-interpretive strategies to unread patriarchal imposition of veiling.¹⁹⁷ Furthermore the exegesis of the classical male scholars needs to be untangled from the Qur’an and the Sunnah from the Hadiths by parting normative Islam from the historical. This can be achieved even though there may be resistance from the successors to the classical scholars by re-examining the internal relationships of the texts to one another and contexts of textual readings.

¹⁹⁷ Barlas, supra (n 99); Hussain, supra (n 101); Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (2nd edn, Oxford University Press 1999); Fatima Mernissi, *The Veil and the Muslim Elite: A Feminist Interpretation of Women’s Rights in Islam* (Perseus Publications 1992)

Male influenced readings of the Qur'an, which compel veiling under the threat of harsh punishments for women who do not veil, need to be challenged by Muslim men and women, particularly those living in Western states, since the days when lack of education was a contributory cause for recourse to the classical exegesis are long gone. Power plays a crucial role in determining accepted interpretations and Muslim women need to claim their stake in re-interpretations of sacred texts to secure gender neutral outcomes and share power with male scholars of the Qur'an. It is in this context that Muslim feminists who have attempted to unread patriarchy from the sacred texts can make advances on their feminist goal in line with Marshall's assertion, although in a different context that 'Feminism requires that women be able to share in the power structures that control their circumstances'.¹⁹⁸

Modesty is considered by Muslim women to be an essential characteristic that allows them being seen as good Muslims as well as a tool that evades the male gaze. However external projection is not the only method, as other Muslim and non-Muslim women remain modest without the need to project it outwards and to suggest that those women who do not externalise it through veiling are not good Muslims is stereotyping those Muslim women who do not veil. Conversely the demonstration of external modesty through veiling can be a symbol of immodesty as it stands out in Europe as opposed to an Islamic state such as Saudi Arabia where all women are legally required to conform to religious dress codes, thus turning invisibility to even greater visibility.

The voices of those women who veil is not heard in the religious discourse as male Muslim scholars have had sole monopoly over the interpretation of the sacred texts. This leaves the women being silenced and the Qur'an has been appropriated in order to justify the muting of these women in Muslim societies. This silencing by the religious discourse has further ramifications for those who wear the hijab or the veil as it is used as a justification by the socio-feminist and the legal discourse which equates it to oppression and considers these women as vulnerable victims who need saving. The re-reading of religious texts by women will allow women to make a more informed choice as to whether veiling is a product of patriarchal culture in which case the motivations are different and such norms need to be re-articulated or indeed whether it is a religious duty, either way the choice to veil has to rest with women. The drive for change must come from Muslim women whose bodies have been used by men to advance cultural and patriarchal control. No one has a monopoly over the Qur'an and the

¹⁹⁸ Jill Marshall, *Human Rights Law and Personal Identity* (Routledge 2014) 242

steps taken by some Muslim academics at re-interpretation of troubling distorted readings of the Qur'an have to be adopted and furthered by Muslim women whether they veil or not. If veiling is a cultural relic as some believe then its place in Western societies is questionable, not because such societies do not respect other cultures but because the veil as a mandatory cultural requirement can have negative connotations.

CHAPTER TWO – SOCIO FEMINIST DEBATES ON VEILING

Introduction

In the previous chapter the contested theological origins of Muslim veiling and the silencing of Muslim women's voice by gender biased interpretations of sacred texts were examined. This chapter's aim is to engage in a critique of the dominant socio-feminist debates surrounding the practice. The discussion and analysis will be confined to firstly, that veiling is a tool of oppression imposed by patriarchal Muslim societies, and secondly that it liberates Muslim women. Both discourses will be examined within this one chapter, even though it means that the length of it will become longer and equivalent to two chapters. Approaching debates on veiling in a binary form does raise issues around essentialism from both polarities, but in reality there are many overlaps and the merits of the two discourses and their oppositions including their effect on women who wear the hijab or the veil would lead to a better synthesis if considered alongside each other. The aim of this chapter is to show that the disagreement between the oppression versus emancipation perspective leads to the voices of those women who wear the hijab and the veil to be muted from the debates. The chapter will further demonstrate Muslim women engaged in veiling practices are often represented by those who profess to act on behalf of them acting as cultural insiders and instead of modulating their voices, they suppress them with negative stereotypes.

Why is the veil controversial?

The practice of veiling by Muslim women 'remains one of the most controversial issues in post-colonial feminist studies...and has taken centre stage as a symbol of both oppression and resistance'.¹⁹⁹ The woman who veils is to be feared, pitied, desired and respected,²⁰⁰ yet some of these stereotypes are not reflective of the lives of those who veil and fail to take account of the fluid nature of historical, cultural and political practices and their impact on the heterogeneity of contemporary veiling.²⁰¹

Despite the subsistence and coverage in literature, media and academia, Muslim veiling still generates confusion and controversy. Instead of it being laid to rest, it is still ignored, attacked,

¹⁹⁹ Daphne Grace, *The Woman in the Muslim Mask: Veiling and Identity in Postcolonial Literature* (Pluto Press 2004) 1

²⁰⁰ Claire Dwyer, 'Veiled Meanings: Young British Muslim Women and the Negotiation of Differences.' (1999) 6 *Gender, Place & Culture* 5

²⁰¹ Sajida Sultana Alvi, Homa Hoodfar and Sheila McDonough (eds), *The Muslim Veil in North America: Issues and Debates* (Women's Press 2003)

dismissed, trivialised or defended.²⁰² It has even been described as something that is comparable to the African American 'coolness' in terms of the wearer's behavioural attitude and aesthetics.²⁰³ The Muslim veil has become 'one of the most contested and symbolic motifs in Western imagery of the East and of Islam...Despite this not much has been done to decode it'.²⁰⁴ Whilst some indict the practice, others defend it, each standpoint articulating views and conclusions on its effects and how it oppresses or liberates women, but there has been little attempt at a centric approach that would be reconciliatory. More crucially the lens of an individual's perspective on veiling is missing from the debates. Lazreg points out the lack of understanding of the experiences of women underneath the veil and claims this leads to misconceptions that the veil is simply a symbol of identity 'it is seldom studied in terms of the reality that lies behind it. Women's strategic uses of the veil and what goes on under the veil remain a mystery'.²⁰⁵ The veil is ambivalent and a shifting signifier of multiple meanings and according to Lindisfarne-Tapper and Ingham 'The image of the veiled woman is not in any way neutral; it is redolent with Orientalist import'.²⁰⁶

An initial observation indicates that the debates on veiling are based on the assumption that Islam and its practices are universal in nature amongst Muslims. This has led to pertinent issues relating to religious differences being mainly unexplored, especially the differences within and across Muslim societies, resulting in those who veil to be treated as having the same motivations for veiling, thus being treated as a group that shares similar behaviours and understandings which can lead to over generalisation when dealing with women who veil.²⁰⁷ This results in oppression of women of difference being measured using 'the Western, most often white, yardstick which codes and represents cultural 'Others' from a position of dominance and superiority'.²⁰⁸ The danger here being that the default position for the veiled woman is one of commonality with all other veiled women lacking the individual agency and

²⁰² Guindi, supra (n 34) xi

²⁰³ Botz-Bornstein, supra (n 179)

²⁰⁴ Wagner and others, supra (n 95) 525

²⁰⁵ Marnia Lazreg, *The Eloquence of Silence: Algerian Women in Question* (Routledge 1994) 14

²⁰⁶ Nancy Lindisfarne-Tapper and Bruce Ingham, 'Approaches to the Study of Dress in the Middle East' in Nancy Lindisfarne-Tapper and Bruce Ingham (eds), *Languages of Dress in the Middle East* (Routledge 2013) 13

²⁰⁷ Caroline S Howarth, 'I Hope We Won't Have to Understand Racism One Day': Researching or Reproducing Race in Social Psychological Research' (2009) 48 *British Journal of Social Psychology* 407

²⁰⁸ Wagner and others, supra (n 95) 526

unable to speak for herself,²⁰⁹ leading to others who oppose or defend the practice including some native informants to represent them.

In a socio-feministic context this results in a tripartite representation whereby those who oppose the practice offer arguments based on secular Western liberal thought and those who defend it propagating their own emancipatory viewpoints, including the use of hermeneutics to neutralise challenges based on the oppressive nature of veiling. Additionally, the religious scholars impose their own strict interpretations of religious texts in relation to the veil. The woman in question who becomes the subject of such discourses receives a further blow when she is not heard and inscribed with negative stereotypes when she attempts to claim her individual rights before the European Court of Human Rights (ECtHR), as will be discussed later in the thesis.

Although this thesis aims to confine the discussion to the use of the veil within a European context, it is near impossible to fully engage with its significance and fluid meaning without some reference to its use in a number of countries where Islam is the dominant religion. This is particularly important as there is a clash of binary viewpoints dependent upon the situational, cultural and the individual and any attempt at analysing the veil cannot be reduced to a single solution, which can result in misleading reductionism. Hence Grace cites Mabro who warns about the veil being 'such a powerful symbol that it can blind us into generalisations'.²¹⁰ Cultural pre-conceptions and rejection of some Western forms of female dressing, which can lead to objectification play a role in viewpoints about the veil and highlight the deep entrenchment of some questionable assumptions about the choices Muslim women make. For example Al-Hibri²¹¹ questions why is it liberating to wear a mini-skirt but oppressive to wear a headscarf? As discussed in the previous chapter both forms of dress can lead to objectification, yet veiling by Muslim women is always at the forefront of oppressive effects of clothing. Wikan uses the example of Oman where veiling is considered a symbol of high social status to assert that veiling 'is much a symbol of male oppression as Western women wearing a blouse'.²¹² The reasons for and the symbolism of veiling is driven by political, gender, social and religious

²⁰⁹ Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Patrick Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (Harvester Wheatsheaf 1994)

²¹⁰ Grace, supra (n 199) 10

²¹¹ Azizah Al-Hibri, 'Is Western Patriarchal Feminism Good for Third World Minority Women?' in Joshua Cohen, Mathew Howard and Martha C Nussbaum (eds), *Is Multiculturalism Bad for Women* (Princeton University Press 1999) 46

²¹² Unni Wikan, "The Burqa Facial Mask", in *Behind the Veil in Arabia: Women in Arabia* (University of Chicago Press 1982) 106

vectoring and thus attempts at structuring religious identity, concepts and social hierarchies are very much an open field, however the most important actors in such debates are those women who live the experience of veiling.

The veil as a tool of patriarchy

A criticism that has been frequently levelled by those who oppose the use of Islamic veiling has been based on the grounds that the practice is patriarchal in nature. Muslim societies are considered to be patriarchal and 'There appears to be an assumption that most religions and Islam in particular are patriarchal and against gender equality'²¹³ and these inherent features play a role in denial of autonomy for Muslim women. Some Muslim men restrict freedom of women belonging to their community as an exercise of patriarchal power²¹⁴ and 'this curtailment usually relies on the invoking of religiously derived modesty laws to regulate women's movement and lifestyle choices'²¹⁵ resulting in these women being represented as passive and repressed victims of their patriarchal cultures.

The term 'patriarchy' has its origins in Abrahamic religions²¹⁶ and is used to describe an overarching system of male dominance over women,²¹⁷ particularly reserved for the father exercising his rule over his wife, children and dependants.²¹⁸ Al-Hibri is of the view that religions generally have a patriarchal view of the relationship between genders and writes that 'God was declared male and man was declared to be created in His likeness. Eve became the symbol of temptation and sin. The woman was consequently judged as a less likely candidate for salvation and an everlasting life in heaven than man'.²¹⁹ However, Badawi dissociates such a nexus of culpability on women stating that:

The Qur'an does not blame women for the fall of man, nor does it view pregnancy and childbirth as punishments for eating from the forbidden tree. On the contrary,

²¹³ Jill Marshall, *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff 2009) 152

²¹⁴ Gita Sahgal and Nira Yuval-Davis (eds), *Refusing Holy Orders: Women and Fundamentalism in Britain* (Virago Press Ltd 1992) 2

²¹⁵ Hasmita Ramji, 'Dynamics of Religion and Gender amongst Young British Muslims' (2007) 41 *Sociology* 1171, 1173

²¹⁶ The concept of patriarchy has its roots in the Old Testament where the father the 'patriarch was a ruler of a family or tribe and metaphorically the head of the religious order or the church. The Oxford Dictionary Online defines patriarchy as 'relating to or denoting a system of society or government controlled by men'.

²¹⁷ Kate Millet, *Sexual Politics* (Sphere 1971)

²¹⁸ Juliet Mitchell, *Psychoanalysis and Feminism* (Allen Lane 1974)

²¹⁹ Azizah Al-Hibri, 'Capitalism is an Advanced Stage of Patriarchy' in Lydia Sargent (ed), *Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (South End Press 1981) 176

the Qur'an depicts Adam and Eve as equally responsible for their sin in the garden, never singling out Eve for the blame.²²⁰

He further clarifies that 'men and women have the same religious and moral duties and responsibilities'.²²¹ As such the Qur'an does not afford any superiority to any specific gender, since it is based purely on righteousness.²²² It is objectionable to extend the meaning of the term patriarchy to all forms of male dominance over women, as that could give rise to universalism which would only exasperate essentialisms associated with biological differences between the sexes.²²³

Patriarchy in the name of Islam

The particular form of male dominance with respect to the hijab and the veil as examined in the previous chapter has been the inscription of dangerous sexuality on the bodies of Muslim women, mediated through gender biased religious interpretations of sacred texts, which have then perpetuated through the Islamic social and family structures and been defined as Muslim female modesty. Sexuality in Islam is encouraged within marriage but outside of marriage it attacks women, as they are deemed an active sexual power and a destructive force that can lead men astray. Thus religious doctrine considers it important to restrict their sexual power over men by controlling this sexuality outside of marriage.²²⁴ It is this element of control over women via the imposition of dress codes by men, particularly the presence of any coercion by the father, brother, husband situated in the Muslim family structure that gives rise to the attack on the veil. The argument based on the notion that the woman is forced and suffers from a deficiency of her own individual choice when she decides to wear the hijab or the veil. It is no surprise that such an allegation is made since religion is believed to be primarily the reason women veil; as it warrants modesty from the woman. It is this visual expression that leads Hoodfar to comment that 'to the Western feminist eye the image of the veiled woman obscures all else'.²²⁵ But it does not help the cause of veiled women when Muslim scholars are of the view that:

²²⁰ Badawi, supra (n 107) 7

²²¹ ibid

²²² O mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo! the noblest of you, in the sight of Allah, is the best in conduct. Lo! Allah is Knower, Aware (Sura 49:13) Picthall, supra (n 65)

²²³ Michele Barratt, *Women's Oppression Today: The Marxist Feminist Encounter* (Verso 1988) 23

²²⁴ Mernissi, *Beyond The Veil: Male-Female Dynamics in Muslim Society*, supra (n 93) 19

²²⁵ Homa Hoodfar, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women' (1993) 22 *Review of Feminist Research* 5, 14

The restrictions placed upon [the woman] regarding her dress and the display of her beauty and ornament is only to guard against all ways of corruption arising from such dazzling displays. What Islam has established is not a restriction on freedom of women but is a firm protection for her from falling down to the lowest levels of humility.²²⁶

Or when a reputed scholar such as Allama Ibn Jauzi in *Ahkam al-Nisa* writes 'I believe that a woman leaving her home and wandering on the streets is the biggest *fitna*,²²⁷ let alone exhibiting her beauty and her body which is simply adding fuel to fire'.²²⁸ Such statements from leading scholars who overlook the inroads Muslim women have made in professional and political life²²⁹ come across as firmly committed to religious conservatism and patriarchal. It is not clear who women need saving from? Who does the protecting? Does a piece of cloth protect women? And why is such protection not deemed necessary for men? What does the reference to the lowest levels of humility mean? Such statements leave the possibility of conclusions that Muslim women cannot or do not have the ability to have their own voice or even act for themselves. These presumptions are clearly deeply rooted in patriarchal traditions that demarcate rights, roles and duties of men and women in Muslim societies. The consequence of male maintained religious discourse leads to the voices of Muslim women coerced into veiling by the force of religion and tradition being silenced and those who attempt speak out by challenging such traditions through re-interpretations of the sacred texts are ignored.

The scholars who dominate religious discourse use their power over knowledge production to ensure any digression from male pre-determined norms would result in condemnation of women who do not adhere to the norms being labelled as immodest or ones who refuse to obey holy orders. The consequence of such allegations often results in women being ostracised and considered a bad example to other women and letting down the whole community. In order to avoid such attacks on a woman's personhood, wearing the male mandated religious clothing allows a woman to remain a part of the community, retaining the respect of her family. This is in line with Bourdieu's observation that people

²²⁶ Muhammad Bin Ismail, *The Hijab: Why?* (2nd edn, Saaid 1993) 1

²²⁷ The term 'fitna' has various meanings but in this context means corrupting the mind of the man

²²⁸ Cited in Mohammed Ismail Memon Madani, *Hijab: The Islamic Commandments of the Hijab* (Darul Ishaat 2000) 10

²²⁹ For example there have been many Muslim female leaders including: Begum Khaleda Zia and Sheikh Hasina of Bangladesh, the Late Benazir Bhutto of Pakistan and Tensu Cillar of Turkey

demonstrate their status by appearing the 'right way' and those who fail to do that will have their taste, morality and social worth being questioned.²³⁰

According to Grace, most feminists including some Muslim ones agree that Islamic veiling is a result of women being dominated and by patriarchy in the name of religion.²³¹ Penny goes a step further and argues that it is not religion that oppresses women but patriarchy. For her the question is 'not to what extent the veil can be considered oppressive but whether it is ever justifiable for men to mandate how women should look, dress and behave in the name of preserving culture?'²³² She further describes the experience when she and her Muslim veiled friend swapped clothes for two weeks as a social experiment:

Both of us felt immensely liberated, our bodies were finally our own, hers to show off as she pleased, mine to cover if I wanted. For the first time since puberty, I felt that people might be seeing the real me, rather than looking at my body... this flavour of freedom... is just as valid and important a choice as the freedom to go bare-legged and low cut. A truly progressive Western culture would respect both. But what European governments seem not to have grasped is that freedom to wear whatever little dress we like is not every woman's idea of the zenith of personal emancipation.

This indicates that patriarchy is not just prevalent amongst Muslim women but it is also a live issue for some Western women. As for the veiled women Muslim feminists such as Barlas attribute patriarchy that prevents women from claiming their body as their own, not to Islam but the patriarchal readings of the Qur'an which have been interpreted by men for men.²³³

Some attribute the male dominance form of patriarchy to be highly prevalent amongst Muslim societies and a good example of it is evident in Ramji's study in which a 21 year old male states '[A] real man wouldn't need his wife, or sister to go out and work. It's his responsibility. It's harem (un-Islamic) to have the women in your family working'.²³⁴ Here it is being suggested

²³⁰ Pierre Bourdieu, *Distinction: A Social critique of the Judgement of Taste* (Harvard University Press 1984) 21

²³¹ Grace, supra (n 199) 18

²³² Laurie Penny, 'Laurie penny on the Burqa: a modesty slip for misogyny' (*New Statesman*, 2010) <<http://www.newstatesman.com/blogs/laurie-penny/2010/05/women-across-veil-british>> accessed 12 March 2014

²³³ Barlas, supra (n 99)

²³⁴ Ramji, supra (n 215) 1176

that those men who allow women to get educated with a view to following a career are not 'real men' and in any event women are not supposed to work. To declare a woman working as being 'harem' is clearly a misconceived understanding of Islam as it does not forbid women from working. Indeed it is a classic case of cultural norms being falsely defended using religion. Similarly there are those who defend the veil on the same basis as another male asserts 'What do women need degrees for anyway? They're not allowed to work. They can only work inside the home. I certainly won't let my wife work... She'll have to observe purdah'.²³⁵ Such gendered constructions are rooted in contradictions of Qur'anic norms and facilitate the dual standards possessed by men, who subordinate women's position and justify the inequality in powers on the basis that they possess religiously sanctioned gender identity and is typical of the patriarchy prevalent amongst Muslim men. This is affirmed by one of the female participant's in the study who states that:

It's not British society that makes being a Muslim difficult, it's Muslim men...they don't know what being a Muslim is all about...all they're concerned with is making sure everyone only takes them seriously and ignores women.²³⁶

Patriarchy beyond Muslim culture

Patriarchy can materialise in a number of different guises and is no stranger to Western societies;²³⁷ it can refer to the organisation of a society (including the economy and paid work), a religion and a household. In many societies the patriarchal status quo was, until relatively recent times, accepted as the natural order of things, one very much based on a biological justification of the inequalities to which women were subjected. Women as mothers, it was argued and indeed seldom questioned, were the natural ones to take on the caring domestic role, leaving men free to pursue the more physically taxing roles that women were believed to be incapable of performing and thus unsuitable.

Johnson describes Patriarchy as 'A system of male domination that involves the subordination of women. Patriarchy takes different forms in different societies and different historical periods. It interacts with other forms of oppression, such as class, race and sexuality, in very

²³⁵ Ibid 1178

²³⁶ Ibid 1184

²³⁷ The 2014 Global Gender Gap Report published by the World Economic Forum showed that the UK had slipped down in the gender gap rankings from 18th place to 26th, putting Britain behind Scandinavian countries and others such as the Philippines, Nicaragua and Rwanda with the UK failing to make the top twenty in any of the report's four categories – economy, education, health and politics; World Economic Forum, 'The Global Gender Gap Report 2014' (2014) <<http://reports.weforum.org/global-gender-gap-report-2014/rankings/>> accessed 2 December 2014

complex ways'.²³⁸ In Walby's seminal work on patriarchy, she also projects a broad definition of patriarchy describing it as 'a system of social structures, and practices in which men dominate, oppress and exploit women'.²³⁹ She is able to avoid any challenges of essentialism and universalism by breaking down patriarchy into six separate structures²⁴⁰ each being an autonomous structure and the permutations of the structures, demonstrating the flexibility of patriarchy. Whilst the opponents of the veil would like to believe that classic patriarchy is rife amongst Muslim societies and has been undermined and slowly eroded throughout much of the Western world, this is not universally accepted as patriarchy is still present within Western society and in many instances it is stronger than ever before. All that has changed, it is suggested, is its modus operandi, moving from the domestic to the public space.

Walby suggests that instead of patriarchy being eliminated in the West, it has intensified and not only has its degree changed but also its form. She states 'Britain has seen a movement from a private to a public form of patriarchy over the last century'.²⁴¹ According to her six structures of patriarchy, the classical form of patriarchy has shifted from the private to the public sphere and acknowledges it is present within each structure. Western households still retain patriarchal structures with male working partners, women remaining as housewives or if in employment they take up part time employment whilst being responsible for childcare arrangements, replacing the traditional form of patriarchy where the husband is the head of the family.

It is arguable that many European families are still essentially patriarchal institutions and the widespread patriarchy beneath the veneer of Western secular societies is well captured by Lees when he examined the role of Christian women in British society.²⁴² Indeed all societies and religions at some point in their history have suffered or still do from patriarchy as Hirschmann notes that:

Islam is no more restrictively patriarchal than other religions, such as Judaism or Christianity. Catholic prohibitions on abortions, as well as the surging popularity of 'promise keepers', which urges men to forcibly assert their proper place as the

²³⁸ Carol Johnson, 'Does Capitalism Really Need Patriarchy?' (1996) 19 Women's Studies International Forum 193, 201

²³⁹ Sylvia Walby, *Theorising Patriarchy* (Blackwell 1990) 214

²⁴⁰ The six structures being: husbands exploiting their wives labour; the state; male violence; relations within waged labour; sexuality; culture

²⁴¹ Walby, supra (n 239) 24

²⁴² Shirley Lees (ed), *The Role of Women: When Christians Disagree* (Inter-Varsity Press 1991)

leader of the family, are only two examples of the ways in which Western religions are far from egalitarian in gendered terms. And the Amish, the Mennonites, and the orthodox Jews prescribe dress codes for both men and women.²⁴³

Although the form and degree of patriarchal practices may have changed, its extent and impact within the Muslim society is considerably different from that encountered by non-Muslim women as they are subject to considerably different issues. Despite them being subjected to similar public forms of patriarchy as those encountered by non-Muslim women, they are also affected by more specifically cultural forms of Islamic patriarchy, that may be the result of cultural as well as religious differences. According to Jawad, this is a 'double oppression' to which Muslim women are subjected to; she suggests they suffer oppression from the culture of their community and also from the culture of their religion:

Our parents' traditional attitudes... their cultural values, their family honour, their stubbornness to let go of the traditions that do not do anything for anyone living in Britain. If a girl stands up for her rights she brings shame on the family. These old fashioned ideas are what oppress Muslim girls not Islam.²⁴⁴

Therefore when integrating religion and culture into the patriarchy equation, it becomes evident that Muslim women in the West are likely to face a complex web of patriarchal structures. Kandiyoti identifies Islamic culture's position as the clearest example of classical patriarchy existing within the geographical area that includes North Africa, the Muslim Middle East (including Turkey, Pakistan and Iran), and South and East Asia (specifically, India and China).²⁴⁵ The majority of Muslim communities settled in Europe have originated from these countries. According to Kandiyoti, the reproduction of these classical patriarchal dynamics relies on the operations of the 'patrilocally extended household... commonly associated with the reproduction of the peasantry in agrarian societies'.²⁴⁶ Whilst acculturation into host societies and the distance from mother countries has resulted in the dismantling of some

²⁴³ Nancy J Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton University Press 2003) 182

²⁴⁴ Haifaa Jawad, 'Historical and Contemporary Perspectives of Muslim Women Living in the West' in Haifaa Jawad and Tansin Benn (eds), *Muslim Women in the United Kingdom and Beyond: Experiences and Images* (Brill 2003) 2

²⁴⁵ Deniz Kandiyoti, 'Bargaining with Patriarchy' (1988) 2 *Gender & Society* 274, 278

²⁴⁶ *Ibid* 278

patriarchal households, an increase in the number of religious schools, mosques and visibility of religious dress indicates that there is retention of traditional practices. According to Kandiyoti 'Even though demographic and other constraints may have curtailed the numerical predominance of three-generational patrilocal households, there is little doubt that they represent a powerful cultural ideal.'²⁴⁷

Muslim households and patriarchal practices

The existence of some practices among Muslims in Europe support claims that Islamic culture still remains inherently patriarchal. For example, amongst Muslim communities there are still a great number of arranged marriages with a real increase of online websites catering not only for Muslims but also different races and castes.²⁴⁸ This suggests some Muslim girls may be being influenced by parents and indeed some have been forced to marry partners chosen by parents. According to Kandiyoti 'Under classic patriarchy, girls are given away in marriage at a very young age into households headed by their husband's father. There they are subordinate not only to all men but also to the more senior women, especially their mother-in-law.'²⁴⁹ The issue of forced marriages is now being dealt with by way of criminalising the practice and a number of European states since the Council of Europe report on the matter have enacted legislative provisions that impose criminal liability on those who force women into marriage.²⁵⁰ Domestic abuse is common amongst Muslim households but often goes unreported due to the lack of witnesses who are willing to come forward as it is considered as bringing shame on the family and so is difficult to quantify, making the problem extremely difficult for the authorities to address.

Another patriarchal practice that has gained prominence amongst Muslims is the growing availability of prenatal sex identification scans that has led to fears that female fetuses may be aborted.²⁵¹ Women, especially those who have travelled from the Asian sub-continent and have married into families that are traditional get cut out from the rest of the community becoming highly dependent on their husband and his parents. Although such practices are

²⁴⁷ Ibid

²⁴⁸ One well known website www.muslima.com allows members to filter a prospective partner by age, religion (sunni, shia), country, employment, whether a male has a beard or a female veils and even a preference for polygamy

²⁴⁹ Kandiyoti, supra (n245) 278

²⁵⁰ Council of Europe, *Forced Marriages in Council of Europe: A Comparative Study of Legislation* (CDEG (2005) 1, 2005)

²⁵¹ Radhika Sanghani, 'Sex-selection abortions: why are some British Asians aborting female fetuses?' *The Telegraph* (16 January 2014) Women's Health <<http://www.telegraph.co.uk/women/womens-health/10574805/Illegal-sex-selection-abortions-why-are-some-British-Asians-aborting-their-female-foetuses.html>> accessed 18 February 2014

getting less common due to the many generations of Muslims domiciled in European societies, those women who have joined by virtue of arranged marriages from overseas are prone to traditional household patriarchy that seeks male heirs.²⁵² However the same women can become complicit to such perpetuation of patriarchy and may even ignore or refuse to deviate from it. This is what Kandiyoti describes as patriarchal bargaining: ‘... women often resist the process of transition because they see the old normative order slipping away from them without any empowering alternative.’²⁵³ Okin corroborates this point suggesting that older women often become co-opted into reinforcing gender inequality, thus she proposes that change must be actuated through young women as ‘Their interests may be harmed rather than promoted...’ if their views are not represented.²⁵⁴ Of course there are other manifestations of patriarchal practices amongst Muslim communities in the form of female genital mutilation (FGM) and honour based violence but any discussion of these is beyond the scope of this thesis.

In terms of veiling as a patriarchal practice, Bartowski and Read (2003) who interviewed veiled and unveiled Muslim women in the United States found that the women who veiled were extremely defensive about the practice, whilst those who opposed tended to criticise it as a patriarchal tool of oppression.²⁵⁵ Furthermore, they noted that a strong sense of ‘sisterhood’ came from the women’s affiliation to Islam reinforcing the argument that veiling allows Islamic identity to be propagated:

In part, this sisterhood is fostered by the marginalization of Islam from the Christocentric cultural mainstream in the United States. Because some of these women don hijab and others eschew it, these women disagree about the meaning of the veil and its place in Islam.²⁵⁶

²⁵² In Muslim societies the male is considered as the one that perpetuates the family name and indeed in some Arab societies a man’s name is preceded by his father’s and grandfather’s

²⁵³ Kandiyoti, supra (n 245) 282

²⁵⁴ Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Joshua Cohen, Mathew Howard and Martha C. Nussbaum eds, Princeton University Press 1999) 24

²⁵⁵ John Bartkowski and Jennan Ghazal Read, ‘Veiled Submission: Gender, Power, and Identity Among Evangelical and Muslim Women in the United States’ (2003) 26 *Qualitative Sociology* 71, 86

²⁵⁶ *Ibid* 87

According to Weeks this disagreement arises because ‘Struggles around sexuality ...are struggles over meanings - over what is appropriate or not appropriate’; and in defining meanings and regulating practices, religion plays a vital role.²⁵⁷ There is no doubt that patriarchy and traditional family structures exist in Muslim and non-Muslim societies but the real differences are a matter of degree, with the main distinguishing feature being the extent of the freedom of choice available or exercised. If some Muslim women are marrying or growing up in such patriarchal households then any lack of freedom of choice relating to a choice of dress or the requirement of modesty codes imposed by the husband or in laws constitutes the silencing of the voices of these women. It has to be acknowledged that the numbers of such women are likely to be small and does not mean that all Muslim women in Europe are subjected to the traditional forms of patriarchy, the number of these women who enter higher education, employment and do not wear the hijab or the veil is a good indicator of this. However despite Muslim women gaining education and employment, it is evident from Ramji’s study referred to earlier in this chapter²⁵⁸ that there are a number of Muslim men who believe in gendered roles, and retention of patriarchal traditions based on mis-interpretations of sacred texts used as justifications for religiously sanctioned male dominance, clearly demonstrating the gender inequality prevalent amongst some Muslim men.

Gender equality and veiling

The debate between freedom of religion and gender discrimination has become a complex and a controversial one in Western states, due to religious manifestations, especially those religions where the female and male are not only perceived to be different, but are treated differently. According to the Council of Europe,²⁵⁹ this has often led to women’s rights being limited and violated with religious justification. The religiously motivated gender stereotypes have falsely endowed men with a sense of superiority, leading to discriminatory treatment of women by men.²⁶⁰ This is particularly striking when the object happens to be a Muslim woman who is expected to wear the hijab or the veil as a religious obligation. Gender equality has been frequently referred to as a key objective for the European Convention on Human Rights to achieve and has been one of the motivating factor’s leading to claims of wearing the hijab as religious right not succeeding on the grounds of it being a symbol of gender equality.²⁶¹ Thus any clash between gender equality and veiling as a cultural or religious motivation will result in

²⁵⁷ Jeffery Weeks, *Sexuality and its Discontents: Meanings, Myths and Modern Sexualities* (Routledge and Kegan Paul 1985) 35

²⁵⁸ Ramji, *supra* (n 215)

²⁵⁹ Council of Europe, *Women and Religion in Europe* (Resolution 1464 Parliamentary Assembly, 2005)

²⁶⁰ *Ibid* para 2

²⁶¹ *Leyla Sahin v. Turkey [GC]*, *supra* (n 28) para 115

gender equality always prevailing.²⁶² Thus if the Muslim veil is a product of gender bias, which leads to inequality between the sexes, then religion or culture cannot trump the quest to eliminate gender inequalities by the European rights framework as that would be one example where the state would be justified in constraining one freedom for the greater good, that of women as a whole.

The veil has been stereotyped by those who oppose it as an 'explicit symbol of oppression towards the female gender' and those who adopt it are accepting an unequal female status.²⁶³ Gender equality is particularly pertinent to these oppositional stances as those opposing the veil or the full burqa see it as a method of being shrouded in darkness, which leaves women engaged in such practices, literally and metaphorically as being invisible to the rest of society. This leads to veiling being perceived as means of silencing women and pushed into obscurity by men, leaving them invisible, mute and lacking in validity. However, since veiling can be said to suppress women it can be argued that this reductionism can offer instances of appreciation of a woman's cognitive capacities, where instead of being judged by their looks and dress, which distracts and prevents men from appreciating their mind, non-revealing smart clothes worn by women can overcome this judgement of sexuality. The gender equality argument proceeds by situating gender against culture and religion on the basis of equality, liberalism and human rights and as these are fundamental values in Western societies, veiling is regarded as being incompatible with these values. The opposing arguments being that the choice exercised through veiling is emancipatory and equalises gender relations as opposed to patriarchal oppression.

Female genital mutilation, enforced dress codes, the prohibition on driving, polygamy, lack of access to education, unilateral male privilege to divorce, unequal inheritance provisions, severe punishments for adultery, forced marriages and honour based violence are all examples used to support the contention that Muslim women in Islam lack equality. The lack in equality attributed to veiling is further aggravated when the defence to such accusations is solely based around religious obligation, which is then used as form of psychological and physical coercion to force compliance. Comments such as those made by a senior Muslim cleric in Australia in 2006 do not help in perceptions of gender equality and are indicative of the psychological

²⁶² Jill Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' (2015) 15 *Human Rights Law Review* 377, 383

²⁶³ Michela Ardizzone, 'Unveiling the Veil: Gendered Discourses and the (in)visibility of the Female Body in France' (2004) 33 *Women's Studies* 629, 640

coercion. He compared women who do not wear a headscarf to 'uncovered meat', implying that they invited sexual assault. Sheik Taj Aldin al-Hilali delivered his comments in a religious address on adultery to around 500 worshippers in Sydney and was quoted as saying:

If you take out uncovered meat and place it outside ... without cover, and the cats come to eat it ... whose fault is it, the cats' or the uncovered meat's? The uncovered meat is the problem. If she was in her room, in her home, in her hijab, no problem would have occurred.²⁶⁴

It is then no surprise that veiling is seen negatively and directly in conflict with the feminist notion that treats gender as an entity that is flexible and not as a binary which appears to be the case in Muslim societies. The requirement of veiling whether religious or as an expectation of maintenance of Muslim social norms, restricts the psychological negotiation of gender identity in a society where visibility is subject to stringent requirements. This in turn does not leave any room for manoeuvre and only leaves definitive polarisation as male or female. For example, more recently a Zimbabwean cleric, who studied in Saudi Arabia, has described same-sex acts as 'filthy', 'wrong' and synonymous with 'acts of immorality'. He has been recorded as saying 'With all due respect to the animals, [gay people] are worse than those animals.'²⁶⁵ The dissemination of his comments led to a number of Islamic student societies at UK universities where he was due to deliver talks to be cancelled. Although his talks did not go ahead, his comments and any affiliations Muslims in Western societies have with such religious clerics hinder the progress of those Muslims who want to abide by the principles of equality and tolerance, particularly as the organisers of the tour said 'the tour aimed to promote peace, tolerance and justice'.²⁶⁶

Muslim cultures and gendering

Muslim cultures although variant to each other, expect that the young will be brought up in a gendered way including the way they dress, their access to public space and their freedom to engage and interact with the opposite sex. This gendering begins at birth in many Muslim societies, for example it is common amongst the south Asian Muslim communities that when a

²⁶⁴ Mark Tran, 'Australian Muslim leader compares uncovered women to exposed meat' *The Guardian World News* (Sydney, 26 October 2006)

<<http://www.theguardian.com/world/2006/oct/26/australia.marktran>> accessed 15 November 2010

²⁶⁵ Sarah Morrison, 'Universities cancel Muslim cleric's speaking tour over concerns about his anti-gay views' *The Independent* (7 November 2013) Student News

<<http://www.independent.co.uk/student/news/universities-cancel-muslim-clerics-speaking-tour-over-concerns-about-his-antigay-views-8927902.html>> accessed 19 November 2013

²⁶⁶ 'Mufti tour cancelled' *Asian Image* (November 2013) 7

male is born, the birth is celebrated with distribution of sweets, with no such practice if a girl is born. This demonstrates the preference and importance attached to males in such societies and is due to a male growing up and going to work bringing an income into the household. Whereas a woman is burdened as a carrier of the family honour, which is always at risk of being lost if she has any type of a relationship with a man who is not a member of the family or a sexual relationship outside of marriage. Therefore she has the potential to bring shame to the rest of the family. Incidents of honour based violence against women and those men who are complicit to any illicit relationship with Muslim women is clear evidence of the unequal status of women in Muslim societies.

Early gendering practices are also evident in the Egyptian *El-Sebou* ceremony that takes place on the seventh day after the birth of a child when gendered clay pots²⁶⁷ are used as part of the ceremony effectively marking the end of gender neutrality. El-Guindi describes how the pot for the girls is dressed up by women with jewellery and the one for the boy is dressed up by the father with his prayer beads. She remarks that:

El-Sebou dress is integral to identity and gender... It is embedded in the process of establishing the new-born's identity publicly and ceremonially – an identity shaped by the two most marked aspects of the culture: gender and family. The ceremony marks the first point in the ceremonialised life cycle of the individual, ending a liminal phase of gender neutrality.²⁶⁸

There are many ceremonies in Muslim societies that delete gender neutrality in early stages of an individual's life including hair cutting, dress, circumcision and the offering made on the seventh day of birth as a sign of gratitude to God which is prescribed by the Hadith²⁶⁹ entailing the sacrificial offering of two goats if a boy is born and one goat if it is a girl. With respect to dress as an indicator of gender, Eicher and Roach-Higgins argue that:

Dress is a powerful means of communication and makes statements about the gender role of a new-born soon after birth and specific types of

²⁶⁷ The pot for the girl called an '*Ollah*' which is adorned with a wavy rim on its neck and the pot for the boy called '*Abri*' has a spout and a handle

²⁶⁸ Guindi, supra (n 34) 64

²⁶⁹ Hadith is the secondary source of Islamic law and this particular prescription is contained in Hadith no.1513 Jami' At-Tirmidhi Volume 3

dress...communicate gender differentiations that have consequences for the behaviour of females and males throughout their lives.²⁷⁰

Since gendering takes place at birth, a compelling inference is that Muslim societies relate gender directly with biological sex negating the promotion of a gender neutral identity and a growing up that is free from influenced gender norms facilitating the individual's choice of identity. Gender should not be a determinant of a person's treatment by society, yet veiling and other Islamic attire requirements emphasise the way which gender is obvious to all, and this identity determines the manner by which women navigate around and how they will be treated by the rest of society. Muslim societies prescribing different dress requirements on women limit the wearers own definitions of womanhood and how they wish to represent themselves to others. To be identified as a woman she must conform to how Muslim society has characterised her irrespective of her own definition.

How a woman navigates wearing a veil, particularly the full burqa, severely limits physical mobility and the ability to engage in certain physical activities that require unrestrictive full movement, where the work may be of a physical nature and is fast paced requiring instantaneous physical reactions. For example it is rare in Europe if at all that one would see a police officer, a military woman or in any of the other emergency services who wears the veil. This limitation may not be an intended outcome but nevertheless contributes to the notion that the male is stronger, more capable and mobile, thus has better navigation abilities. The reduced ability could be interpreted as an attenuation of social mobility, which is linked with the fact that the veil is instrumental in identifying the wearer as a female, effectively mandating and acting as a limiter to how she interacts with the rest of society. This restriction is further compounded by possible health implications from the lack of vitamin D which is heavily dependent upon letting sunshine through to the woman. This is a concern expressed by Dr Miriam Casey, an expert in Medicine for the Elderly at the Osteoporosis Unit in St James hospital in Dublin who warns 'The Burqa – an all-enveloping outer garment, does not allow enough sunlight through to give the woman vitamin D'.²⁷¹ This could lead to an additional inequality in terms of parity of access to the benefits of nature which a man is able to gain fully. However, the research in this area is rudimentary and a direct link has not yet been

²⁷⁰ Joanne Eicher and Roach Higgins, 'Dress and Identity' (1992) 10 *Clothing and Textile Research Journal* 1, 8

²⁷¹ Adriana Stuit, 'Women could endanger their health by wearing Burqas' *Digital Journal* <<http://digitaljournal.com/article/272307>> accessed 21 January 2014

established with veiling and lack of vitamin D, due to the fact that veil wearers may well have ample exposure to the sun in non-public surroundings.

In response to such limitations, women who cover fully propagate the argument that wearing of the veil allows them to enter public space considered in Islamic cultures as a domain belonging to men. And that it further allows them to enter those spaces such as employment alongside men which would not be possible without the veil as many of the women cited in the works of El-Guindi and Bullock.²⁷² Hirschmann remarks that the '[veil] allows women to enter the public sphere of work while at the same time making a clear statement that they are good women, that is, attentive to the tenets of Islam, not Westernised'.²⁷³ Thus the veil becomes an important marker that allows the woman to enter public space as well as assert that her Muslim identity has not been chipped by modernity.

Those who argue that veiling permits entry of public space say that it can '...serve as a form of symbolic shelter that, as a portable extension of the secluded space of the home, enables them to enter public male space without being subjected to criticism or male harassment'.²⁷⁴ But retention of the dual purpose of Muslim identity and entry into public space still has limitations for those who veil; as there are places in which men have unlimited access yet Muslim veiled women are rarely seen in. For example Gymnasiums, sports and leisure activities such as swimming would be out of bounds for the veiled woman unless she attends women only pool and gym sessions. This in itself would amount to seclusion and therefore only lead to the message that, her Muslim identity is the entity that is self-limiting in her achieving gender equality.

As much as access to public space is an enhancement for those secluded, there is a negative aspect of this for those who do not veil. It means that Muslim society dominated by men and those who succumb to this domination by veiling and secluding themselves have played a part in creating an environment that is inherently hostile to women who do not veil. This view is corroborated by a respondent of Javed's research who states her reasons for not veiling:

²⁷² Guindi, supra (n 34); Bullock, supra (n 25); Arlene Elowe MacLeod, *Accommodating Protest: Working Women, the New Veiling, and Change in Cairo* (Columbia University Press 1991)

²⁷³ Nancy J Hirschmann, 'Eastern Veiling, Western Freedom' (1997) 59 *The Review of Politics* 461, 480

²⁷⁴ Suzanne Brenner, 'Reconstructing Self and Society: Javanese Muslim Women and the Veil' (1996) 23 *American Ethnologist* 673,674

In veil women can be secure and safe while without veil the woman has to face the eyes of every one on her body which can spoil her soul and snatch innocence. Actually I mean without veil nothing is concealed so women become a hot-cake. Women without veil are considered being the public property and men consider it their foremost right to steer her.²⁷⁵

In addition to protection from harassment, Hirschmann advances another reason which 'allows working, keeps husbands jealousy away so rather than blame men for harassing women alter their dress to accommodate to fit the prevailing norm that men should not be tempted',²⁷⁶ and the 'more women are able to deny their sexuality, the more honourable they are'.²⁷⁷ Similarly MacLeod's research found that religious dress allowed women to work in order to assist their husbands whilst at the same time eliminating any jealousy by the husband which would prevent them from working:

When I wear these clothes I feel secure, I know I am a good mother and a good wife. And men know not to laugh and flirt with me. So it is no problem to go out to work, or to shop, or anything. This is a good way to dress, it solves many problems.²⁷⁸

But MacLeod's results are antagonistic to Zuhur's study²⁷⁹ of veiling in Egypt where she found that the women he studied, although not active Islamists, veiled to show affiliation with goals of Islamism, whilst Macleod's women wore the hijab to avoid personal dilemmas as indicated above. Similarly, on the issue of whether veiling is a symbol of religiosity the studies carried out do not reflect parity on the issue. For example Hoodfar's study²⁸⁰ of veiling carried out in Quebec showed only four women out of fifty nine who veiled held it connected with Arab or Muslim identity. Whereas, MacLeod's study²⁸¹ in Egypt found little correlation between religiosity and veiling as it highlighted only a minority who prayed daily. Thus she concludes

²⁷⁵ Nayab Javed, 'Meanings, Patterns and the Social Functions of Hijab amongst Female University Students' (2014) 1 *European Academic Research* 5499, 5505

²⁷⁶ Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom*, supra (n 243) 184

²⁷⁷ Ibid 187

²⁷⁸ Arlene Elowe MacLeod, 'Hegemonic Relations and Gender Resistance : The New Veiling as Accommodating Protest in Cairo' (1992) 17 *Signs* 533, 543

²⁷⁹ Sherifa Zuhur, *Revealing Reveiling: Islamic Gender Ideology in Contemporary Egypt* (Sunny Press 1992)

²⁸⁰ Hoodfar, 'More than Clothing: Veiling as an Adaptive Strategy', supra (n 26)

²⁸¹ MacLeod, *Accommodating Protest: Working Women, the New Veiling, and Change in Cairo*, supra (n 272)

that veiling had now become a culturally available way to address women's issues about their roles.

Despite the minor adjustment this religious dress allows women, the consequence of this is that it requires them to adapt their identity, because men are not able to control their sexual desires. A further implication of this view is that women must veil to remain safe from men. This suggests husbands or conservatist Muslims apportion blame not on male sexual desire, but rather on the woman's body which can lead men astray. Therefore veiling can be considered a punishment imposed on the woman for possessing a sexuality that leads to social chaos and has to be contained. This masculine fear of women is corroborated by Ali's early analysis of Islam where 'an anxiety that regarded women's desire as untameable, dangerous and thus requiring repression' existed amongst men and was at the root of the imposition of strict codes of conduct and dress, violation of which led to brutal punishment.²⁸²

If Ali's analysis of early Islam is still prevalent in modern times then this punishment via seclusion or veiling is being meted to women at an early stage of women's life. This is so because veiling has been forced on young girls in some Islamic schools,²⁸³ which can only lead to young women growing upon with a sense of guilt and shame associated with their body. This can result in attenuation of the positive self-development leading to denial of claiming her body if the veil is a constant reminder of being used to cover her body that is considered to be the root of conflict. The sense of guilt and shame associated with the female body, according to Wagner et al, is a recurring theme in most monotheistic religions and their study of Indian women showed that they incorporated the fear of sin and felt guilty under the male gaze. In this sense, young women veil not to attract attention but to become invisible in public space.²⁸⁴ The use of fear and sinning especially associated with the afterlife is a tool that is used in order to uphold the gender biased interpretations of the sacred texts, which then allow Muslim men to silence women and to keep them silenced in matters relating to Muslim dress codes. This silencing not only perpetuates male dominance, but transpires as a lack of freedom and choice, which can ultimately be used as a stereotype of women, by those who oppose the practice and the ECtHR in the event of a human rights claim in order to prohibit those who genuinely exercise their choice and decide to wear the hijab or the veil.

²⁸² Tariq Ali, *Clash of Fundamentalisms* (Verso 2002) 63

²⁸³ David Barrett, 'British schools where girls must wear the islamic veil' *The Telegraph* (2 October 2010) Education <<http://www.telegraph.co.uk/education/educationnews/8038820/British-schools-where-girls-must-wear-the-Islamic-veil.html>> accessed 27 December 2013

²⁸⁴ Wagner and others, *supra* (n 95) 530

Of course there is the possibility that veiling is not just to deflect the male gaze but a deliberate step towards concealing her body with the aim of disembodiment of the woman from the self, irrespective of any corporeality. Indeed this lack of reliance on the body corporeal may mean that the veiled woman does not have to burden herself with problems surrounding 'body image' which according many studies has become a real issue affecting women's self-esteem.²⁸⁵ However this assertion is reliant on the premise that veiled women are able to master their psychological existence when they do not appreciate or even allowed to by men of their physical existence. Unless there is mastery of both, the veiled woman has to be in a vacuum that leaves the woman deprived of a self and full of emptiness.

Even if the veil is accepted as unleashing Muslim women from obsessions surrounding body image enhancing the self-consciousness of their everyday actions, covering is still a force that is a constant reminder to women about their faith and the religious duty to be invisible to men. This duty can be considered as the controlling gaze which is the same device referred to by Foucault when he describes the structure of Bentham's Panopticon; the very large prison that only has one jailor. The principle behind the design of the prison being to allow an observer to watch all prisoners without them knowing whether someone is watching them or not thus leading to the perception of an invisible monitor. This then leads to the visibility of the prisoner and his awareness and the possible presence of an observer to constantly maintaining discipline. The success of the system relies on the fact that the individual 'assumes responsibility for the constraints of power,' making himself 'the principle of his own subjection' the individual's constant visibility leads to a feeling of insecurity of the individual. Veiling then acts literally as a result of perceived tripartite surveillance by God, men and other women but the wearer does not know who is actually monitoring.²⁸⁶ The fears of the constant gaze considered as immodest results in the production of docile bodies that internalise the power hierarchies to an extent that the practice of veiling becomes natural.²⁸⁷

²⁸⁵ Savita Bakshi, 'Women's Body Image and the Role of Culture: A Review of the Literature' *Europe's Journal of Psychology* <www.ejop.org> accessed 2 July 2013; Chris J Boyatzis, Sarah Kline and Stephanie Backof, 'Experimental Evidence that Theistic-Religious Body Affirmations Improve Women's Body Image' *Journal for the Scientific Study of Religions* <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5906.2007.00377.x>> accessed 30 June 2013

²⁸⁶ Foucault, *supra* (n 173) 202-3

²⁸⁷ Julie Billaud, 'Visible Under the Veil: Dissimulation, Performance and Agency in an Islamic Public Space' (2009) 11 *Gender and Islam in Asia* 120

Brenner when discussing the change women go through when they start veiling regularly, comments that with covering 'also came the duty, they felt, to make sure that their behaviour matched it; this led to greater self-consciousness and self-regulation than when they had been in their unveiled state'.²⁸⁸ But this is not an obligation on just women but also applies to men and reminds them not to engage in any inappropriate desires, effectively acting as a wall between any immoral interactions between men and woman. According to Gole the influence of the veil leading to self-awareness is accentuated even further by covered women being considered in Muslim societies as markers of modesty and morality.²⁸⁹ But if women are burdened as carriers of this duty whilst men are able to evade such requirements with the ability to act outside of religious injunctions on modesty and morality, yet still remain visible as righteous Muslims, then it can be considered that this forced ascription of inequality in standards is yet another form of gender oppression attributable to the veil, which leaves women silenced.

The gaze aversion strategy may work in Islamic countries, but in Europe an opposite effect is being achieved as veiling is drawing more focus as women are constantly trying to detract attention to them by the practice. This is corroborated by research carried out by Shirazi and Mishra where 88 per cent of their respondents said 'the niqab attracts more attention to the person wearing it rather than distracting the unwanted gaze of men, which is the main reason behind the concept of modesty in Islam'.²⁹⁰ Indeed this is culturally constructed but a veiled Muslim woman in an Islamic country attracts no attention to herself and the veil acts as a symbol of gaze aversion but in Europe that same veil draws immediate attention and is leading to an exponential increase in physical and verbal attacks thus achieving the reverse effect.²⁹¹ This hostility is further confirmed by another respondent of Shirazi and Mishra's research who states that the 'The niqab...takes away a woman's identity completely'. According to them the niqab 'takes modesty to an absurd degree where the female presence doesn't even exist in the public sphere anymore. I hate it because it makes life for other women more difficult and dangerous'.²⁹² Thus extending the concept of modesty beyond the internal where it is

²⁸⁸ Brenner, (n 274) 685

²⁸⁹ Nilufer Gole, 'The Forbidden Modern: Civilisation and Veiling' in Londa Schiebinger (ed), *Feminism and the Body* (Oxford University Press 2000) 465

²⁹⁰ Faegheh Shirazi and Smeeta Mishra, 'Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States' (2010) 13 *International Journal of Cultural Studies* 43, 52

²⁹¹ Irene Zempi and Neil Chakraborti, *Islamophobia, Victimisation and the Veil* (Palgrave 2014)

²⁹² Shirazi and Mishra, 'Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States', 53

manifesting by erasing the visibility and a complete silence of veiled women is having a detrimental effect psychologically and physically on other Muslim women who do not veil or believe it is necessary to express modesty in that manner.

Regardless of whether women want to veil or not Macleod notes a contrary view that 'few are willing to criticise the idea of veiling' and 'few are willing to argue that their religion or cultural traditions are in some way wrong'.²⁹³ This disparity in views can be attributed to the fact that MacLeod's respondents were located in a Muslim country, whereas those Muslim women in Shirazi and Mishra's research were based in the United States, where veiling would attract more attention and acculturation can play a role in Muslim women's liberal views.

The position of Muslims in the West has a direct correlation between the negative perceptions and the need for Muslims to comply with secular Western rights based ideals, in which veiled women are identified as a subject benchmark. Huntingdon in his celebrated work hypothesised that:

The fundamental source of conflict in this new world order will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural...the principal conflicts of global politics will occur between nations and groups of different civilisations. The clash of civilisations will dominate global politics. The fault lines between civilisations will be the battle lines of the future.²⁹⁴

He argues that the most important distinguishing features between civilisation will be culture and religion and as people define their identity in ethnic and religious terms, they are likely to see an 'us versus them' relation existing between themselves and people of different ethnicity or religion. He identifies Islam as one of those clashing civilisations. Similarly, Lewis when comparing Islam with Christianity observes that the single most profound difference between the two is the status of women.²⁹⁵ Joppke notes that 'it is therefore no wonder that the subordination of women has been at the centre of the Western critique of Islam ever since

²⁹³ MacLeod, *Accommodating Protest: Working Women, the New Veiling, and Change in Cairo*, supra (n 272) 140

²⁹⁴ Samuel P Huntington, 'The Clash of Civilisations' *Foreign Affairs* <<http://www.foreignaffairs.com/articles/48950/samuel-p-huntington/the-clash-of-civilizations>> accessed 20 September 2010

²⁹⁵ Bernard Lewis, *What Went Wrong: Western Impact and Middle Eastern response* (Oxford University Press 2002) 67

colonial times, the veil being the most obvious symbol of this subordination'.²⁹⁶ It should therefore come as no surprise that Islamic veiling is regularly raised as the most apparent symbol of this subordination. But Joppke does label Lewis's critique as being hypocritical citing the example given by Ahmed²⁹⁷ who identifies Lord Cromer who condemned veiling and seclusion practices in colonised Egypt, yet back in England he was the founding member of the Men's League for Opposing Women's Suffrage. Joppke further states that 'certainly according to the Koran men and women are equal before God because both are created by God; but it does not follow from that men and women are equal amongst themselves'.²⁹⁸

Indeed, some inequalities between the sexes are created by men, however, it must not be overlooked that the belief that men and women are equal before God is demonstrated by the annual pilgrimage to Mecca known as 'Hajj' when millions of Muslims from every country merge their differences of status, race and culture, and in complete equality stand before their creator. Furthermore, Ali notes that another aspect of Islamic ideology which has a tremendous bearing on equalising the ranks of Muslims is the very strong notion of piety, which is the 'only yardstick by which position of men and women in a Muslim society is determined'.²⁹⁹

In Western societies perfect equality in all human beings is an ideal feminists aim to achieve. Even though according to Ali, that ideal may be set too high because the biological and social life of man has certain built in tendencies, which tend to create inequalities and for that reason 'even in the most liberal democracies, and under ideologies which boast of perfect equality, numerous glaring inequalities continue to persist'.³⁰⁰ The example cited by Ali is one of ethnic inequality in America despite having fundamental laws of equality being written in superb legal terms and are justiciable in the courts of law but their implementation being difficult if the social philosophy is not receptive of them.³⁰¹ However Ali fails to identify any specific examples and overlooks the thrust of feminist work in aiming to achieve that ideal of enforceable total equality. Gender equality between Muslim men and women cannot be achieved so long as long as the power of control over religious knowledge production lies with traditionalist scholars who use the notion of sinning towards women to prevent them from disobeying the

²⁹⁶ Christian Joppke, *Veil Mirror of Identity* (Polity Press 2009) 7

²⁹⁷ Leila Ahmed, *Women and Gender in Islam* (Yale University Press 1992) 153

²⁹⁸ Joppke, supra (n 296) 10

²⁹⁹ Parveen Shaukat Ali, *Human Rights in Islam* (Adam Publishers 2010) 89

³⁰⁰ Ibid 85

³⁰¹ Ibid 86

mandates of sacred texts as interpreted by them. Thus allowing men to retain control over Qur'anic interpretations and these theological justifications act as a great tool to ensure the silence of those women who veil and act as a prevention of hermeneutical challenges by those women who wish to contest such burdensome and gender biased power structures.

Is the veil oppressive?

Oppression is a loaded term and a universal definition acceptable to all disciplines has not been possible, as groups or individuals who are subjected to oppression are not all oppressed to the same extent or in identical ways and it is not possible to attach a single set of criteria that describes the conditions and specific commonalities. Young describes oppression in its general sense as people who are suffering from 'some inhibition of their ability to develop and exercise their capacities and express their needs, thoughts and feelings' and in this abstract sense, all oppressed people face a common condition.³⁰² She also highlights that there are five types of oppression and states these as: violence, exploitation, marginalisation, powerlessness, and cultural imperialism.³⁰³ But Harvey is of the opinion that oppression is much more subtle than once thought and refers to it as civilised oppression that 'involves neither physical violence nor the use of the law. Yet these subtle forms are by the most prevalent in Western industrialised societies.'³⁰⁴ In order to consider feminist arguments that project veiling as oppressive, it is important to establish whether veiling as perceived to be oppressive satisfies some criteria of oppression. Cudd in her work identifies four criteria that are necessary for oppression to exist: some form of physical or psychological harm, harm inflicted due to membership of a group, the oppressor must benefit from the oppression and there must be some element of coercion or force.³⁰⁵

The debate on whether the veil is oppressive or emancipatory is schismatic with powerful arguments and depends on the prism through which the veil is viewed. If the view is one that is based on secular Western liberal values, and the example of veiling under focus is the Saudi Arabian one; where women are clad in head to toe coverings that are imposed by the state and women are secluded from the opposite sex, not allowed to drive, need permission from the husband to leave the house and mingling with unrelated members of the opposite sex is

³⁰² Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 40

³⁰³ Iris Marion Young, 'Five Faces of Oppression' in Lisa Heldke and Peg O'Connor (eds), *Oppression, Privilege and Resistance* (McGraw Hill 2004) 37

³⁰⁴ Jean Harvey, *Civilised Oppression* (Rowman and Littlefield 1999) 1

³⁰⁵ Ann Cudd, 'Oppression by Choice' (1994) 25 *Journal of Social Philosophy* 22, 24-26

http://kuscholarworks.ku.edu/dspace/bitstream/1808/7777/1/Oppression%20by%20Choice%20post%20print.pdf?origin=publication_detail accessed 22 March 2014

forbidden.³⁰⁶ And where failure to adhere to these impositions can result in severe penalties, then the view is one of subjugation.³⁰⁷

Such inequality leads feminists to declare the practice of veiling as being oppressive, however it must be borne in mind that in contrast there are many Muslim countries where veiling is not mandatory and laws have been enacted to prohibit the practice or European states such as the United Kingdom where there are no prohibitions and the choice is left to the individual women. This demonstrates the importance of situational contexts associated with veiling. Fernandez quotes the prominent French feminist Badinter who refers to the veil as 'the symbol of the oppression of a sex...Putting the veil on the head, this is an act of submission. It burdens a woman's whole life'.³⁰⁸ These views are not only held by those who are non-Muslim but are also held by Muslims too and the views are not exclusive to feminists only. Such perceptions are not illusory or simply based on the 'Orient other' but on realities of women living under such regimes, where there is strict application of Shariah law and where men are considered to be superior than women. To someone who is not Muslim, Islamic practices are perceived to stem from the religious and thus erroneous conclusions can be drawn by linking the practice to the religion. One cannot expect a non-Muslim to have detailed knowledge of the intricacies and the disparate interpretations and as such what is seen in the public sphere and the visibility of women, becomes an issue perceived or actual gendered inequality.

Not all non-Muslims are of the opinion that veiling is oppressive, Howard cites Wiley who writes that 'there are many feminists who argue that the headscarf is far from inimical to principles of gender equality, and that to portray it is as such is to misunderstand and misrepresent it'.³⁰⁹ But the issue is one of extremity and the starkness of oppressive practices against Muslim women particularly young Muslim girls; for example, Saudi Arabia's Grand Mufti³¹⁰ Sheikh Abdul-Aziz Al al-Sheikh endorsed marriage for girls starting at ten years of age and criticised those who wanted to raise the legal marriageable age. There are many examples

³⁰⁶ Mohammed Jamjoom and Saad Abedine, 'Saudis order 40 lashes for elderly woman for mingling' (*CNN International*, 2009)
<<http://edition.cnn.com/2009/WORLD/meast/03/09/saudi.arabia.lashes/index.html>> accessed 26 November 2013

³⁰⁷ Saudi Arabia is not the only country where covering is compulsory, Iran and Afghanistan impose veiling on women with severe penalties for failure to comply with the dress codes

³⁰⁸ Sonya Fernandez, 'The Crusade over the Bodies of Women' in Maleiha Malik (ed), *Anti-Muslim Prejudice: Past and Present* (Routledge 2012) 68

³⁰⁹ Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012) 35

³¹⁰ The 'Grand Mufti' is the most senior religious and the legal authority in Saudi Arabia

of young girls of very tender age being married³¹¹ as there is no legal age limit for marriage in Saudi Arabia and what is more surprising is that there has been no official dissent from Western governments to this practice and as noted by one commentator who observes that 'As with many pernicious practices, child marriage³¹² would not exist without tacit support and approval from the country's leadership. Far from condemning child marriage, allegedly the Saudi monarchy itself has a long history of marrying very young girls'.³¹³

The practice of child marriages is prevalent amongst other Islamic countries too,³¹⁴ but some leading clerics are pushing the boundaries of the imposition of religious clothing to include new born girls, albeit in a controversial manner.³¹⁵ Such examples of the treatment of women in Islamic societies, where men simply hide behind strained interpretations of religious texts to suit their misogynist norms, hardly surprises the resultant opinions on the status of women under Islam and the need to save these women from their oppressed lives. Along this line of thought the veil does inhibit freedom, as it prevents women leading their lives they want to lead, and represents female subjugation to others with the Islamic veil deeply embedded as part of that repression.

To some non-Muslims and some Muslims the veil itself is just a piece of cloth and no essential meaning could be derived from its simple materiality and lacks any universal signs of its legal or rational meaning. The veil itself does not oppress women and if it does then that is because the veil as symbolic marker is the symptom of a deeper cultural, social and economic discrepancies and power. The veil itself does not inhibit and demobilise women, but responds to the practice such as negative stereotyping or legal mandates or prohibitions to veiling do. The veil itself has no agency and thus cannot subjugate women; it is the power of man and the patriarchal authority existing in some Muslim social structures that impose the veil on women

³¹¹ ALARABIYA.NET, 'Saudi mufti okays marriage for 10 year old girls' (*Al Arabiya News*, 2009) <<http://www.alarabiya.net/articles/2009/01/15/64297.html>> accessed 26 November 2013

³¹² Child marriage is defined by the Human Rights Watch as marriages where either spouse is below age 18

³¹³ Ali al-Ahmed, 'Why is no one protecting Saudi Arabia's child brides?' *The Guardian* (8 November 2011) Comment is free <<http://www.theguardian.com/commentisfree/2011/nov/08/saudi-arabia-child-brides-marriage>> accessed 26 November 2013

³¹⁴ For example In Afghanistan from a sample of 24,032 households, 53 percent of all women in the 25-49 age group were married by age 18, and 21 percent of the women were married by age 15. And in Yemen a survey of 3,586 households, almost 52 percent of Yemeni girls were married before the age of 18 and 14 percent were married before the age of 15; Human Rights Watch, *Afghanistan: Ending Child Marriage and Domestic Violence* (2011); Human Rights Watch, "How Come You Allow Little Girls to Get Married" *Child Marriage in Yemen* (2011)

³¹⁵ Mohammad Alyousei, "'Burkas for babies': Saudi cleric's new fatwa causes controversy' (*Al Arabiya* 2013) <<http://www.alarabiya.net/articles/2013/02/03/264031.html>> accessed 26 November 2013

that not only inhibits their agency but deprives them of the voice to speak out against the practice. Removing the veil by legally enforced mechanisms, as in France where full concealment of the face is prohibited under law and is a criminal offence misses the point that the veil is simply a symptom of oppression or a refusal to integrate with wider members of society, the disease lies at the use of that tool by man for his means which includes subjugation, seclusion, restricting the balance of power in social relations and controlling a woman's sexuality.

It cannot be denied that women are forced to wear the veil against their will in Islamic regimes and some in European states. Though the coercion in Islamic states carries with it the force of law and in European states the force of patriarchy and for some women it would amount to oppression but the leap from that to stating the veil is inherently oppressive is quite a large one. For example we may say that some women are sexually abused but we don't ban sex as something inherently bad. Of course it cannot be said that the veil has never been misused, there are examples of the use of the veil for improper purposes by both women and men. For example, recently in the UK a terror suspect allegedly used a burqa to escape from a mosque whilst he was under surveillance breaching the terms of a terrorism prevention measure used to restrict the movements of suspects.³¹⁶ Similarly a College employee in the North West of the UK who was found guilty of a number of counts of theft from her employer abused the use of the Islamic veil by attending and leaving court in a veil, attempting to avoid her identity being revealed in press photographs. The employee was well known to have been very much against any form of religious clothing and had pictures of her on a social networking site without any face covering, yet she used a full face veil going into and out of court during her trial in order to conceal her identity from the cameras and on-lookers.³¹⁷

The veil gives meaning and identity and invisibility in some cases to the wearer, but independently it is just a piece of cloth. It gathers its meaning in a culturally and socially contextualised setting within a system of meaning and symbolism which cannot penetrate those who are not part of it. The purpose prescribed by the wearer regardless of its origin,

³¹⁶ Ben Quinn, 'Police search for missing suspect who escaped in a burqa' *The Guardian* (4 November 2013) UK news <<http://www.theguardian.com/uk-news/2013/nov/03/police-search-missing-terror-suspect>> accessed 26 November 2013

³¹⁷ Mark Duell, 'Police UNMASK Muslim woman who turned up in court wearing a niqab to face charges of stealing £21,000 to fund Florida holiday' (*Mail Online*, 2013) <<http://www.dailymail.co.uk/news/article-2424317/Muslim-woman-Shaheda-Lorgat-unmasked-court-stealing-college.html#ixzz2lnZe8Ock>> accessed 26 November 2013

whether in Islamic law or not bears a cultural, religious and historical importance for the woman who chooses to wear it. These women find and express their identity through the performance of wearing the veil. Furthermore, there are different kinds of veils, not just one monolithic entity. People within the Islamic system recognise meanings which may not be obvious to non-Muslims. Most Westerners see the veil in their own lives and their own perceptions and do not understand it in a place and society that are unlike their own, or in their own society where a minority of women adopt it. Indeed in order to evaluate whether the veil is emancipatory or oppressive, it is imperative that it is established whether the practice is one that is imposed on Muslim women or if it is one that is a product of freedom and exercise of choice.

Freedom and choice

In order to analyse the relationship of veiling with choice it is important consider the defining features of freedom first, which in turn will help determine whether veiled women have a choice that is free willed. Values such as freedom and liberalism for the West have been the benchmark of European secular progression from the pre-modern to the modern. 'The concepts of freedom, equality, and rights originated in the West and became the basic tenets of classic liberalism'³¹⁸ and 'Europe - and other civilised countries - have progressed from a state of benighted, pre-modern ignorance, superstition and unfreedom towards a more enlightened state of modernity characterised by freedom and other secular values'.³¹⁹ The importance of liberalism for European states leads to a natural use of freedom as a fundamental liberal value upon which to base the assertion that veiling is oppressive. A society that is liberal will value and allow its citizens to exercise their autonomy, so they could as individuals make those choices that are in their best interest as opposed to the community at large. This approach goes hand in hand with the Millian view that the collective good is best served by letting individuals to pursue their best interests.³²⁰ This primacy of the individual's interests over the utilitarian argument has been further corroborated by more modern philosophers such as Rawls.³²¹

Any state must allow for individuals to make choices that support their own good through the availability of individual rights rather than attempting to enlarge the collective good or a

³¹⁸ Jill Marshall, 'Conditions for Freedom?: European Human Rights Law and the Islamic Headscarf Debate' (2008) 30 Human Rights Quarterly 631, 636

³¹⁹ Linda Woodhead, 'The Muslim Veil Controversy and European Values.' (2009) 97 Swedish Missiological Themes 89, 101

³²⁰ John Stuart Mill, *On Liberty and Other Essays* (John Gray ed, Oxford Paperbacks 2008)

³²¹ John Rawls, *A Theory of Justice* (Oxford University Press 1971)

different good at the expense of individual's rights. Indeed the individual who is free to choose that what is in her/his best interest and has acquired individual rights has a reciprocal duty to ensure this does not interfere with another's right to enjoy the same liberalism, this being the balancing exercise in adjudication of conflicting rights, a very good example being the right of Muslim women in France to wear the veil against the wider French majority who disagree with the practice. It is not about a particular good that an individual chooses but rather the 'agency' that is imperative to the individual, as that precedes any choice exercised by a free agent.

Freedom itself is a contested concept where the challenges to it have been primarily based in questions surrounding definitions. As the question of freedom spans many disciplines there are divergent stakes. For example its importance to the feminist project is encapsulated by Nedelsky who says that 'Feminists are centrally concerned with freeing women to shape our own lives to define who we (each) are, rather than accepting the definition given to us by others (men and male-dominated society, in particular)³²² and this is echoed by Marshall 'Feminists want to free women to shape their own lives, and form their own self- definitions, rather than simply accepting pre-existing definitions given to them by others.³²³

Positive and negative freedom

The theory of freedom most commonly³²⁴ utilised by feminists when referring to veiling is based on Berlin's classic formulation and his metaphor for freedom being the number of doors open to a person, thus defining freedom in terms of the number of options open to a person. His theory of freedom which encapsulates both the concept of positive and negative freedom will form the basis of questioning veiled women's freedom.³²⁵

By negative freedom Berlin refers to the absence of any external obstacles to self-guided choice and action, better known as '*freedom from*' external constraints. Whilst he defines positive freedom as '*freedom to*', which is the ability rather than the opportunity to aim for and pursue those goals that are willed by the agent without dependency on others, also referred to as autonomy or self- rule. Marshall interprets Berlin's concept of positive freedom where individuals are 'able to make their *own* choices and decisions through some sort of

³²² Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law & Feminism 7, 8

³²³ Jill Marshall, *Humanity, Freedom and Feminism* (Ashgate 2005) 4

³²⁴ Ibid; Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom*, supra (n 243)

³²⁵ Isaiah Berlin, *Two Concepts of Liberty in Four Essays on Liberty* (Oxford University Press 1971)

rational method, which fosters an element of internal liberation'.³²⁶ She adds that 'Many feminist theorists have criticised such conceptions of freedom, arguing that they privilege male norms: rationality and reason being associated, both historically and conceptually, with the male way of knowing and often being defined by the exclusion of the feminine'.³²⁷

External constraints can be by way of laws that prohibit certain behaviours or practices, an example of this would be freedom from torture, inhumane, degrading treatment or punishment, which is an absolute right protected by a number of international Treaties.³²⁸ However, if a state was to enact a law that prohibited a woman from wearing a veil, then that would be interfering with her right to dress and manifest her religion as in the case of France, which has prohibited the full face covering in public, enforceable by a criminal penalty.³²⁹ It can be argued that the state can promote freedom of its citizens on their behalf and thus a question arises that is it appropriate for the state to limit someone's freedom whilst attempting to promote the freedom of others? Such an issue became live and forms the basis of the *S.A.S.*³³⁰ case discussed fully in chapter five. The problem in such cases under Berlin's formulation of negative freedom is that the state would be limiting or influencing one's freedom. Negative freedom is also applicable to cases where a woman is free to choose whether she veils or not without any compulsion or influence by family, community or the state.

A Muslim woman may assert that she is a free agent when she decides to veil but arguably she does not have the capability or freedom not to veil, as that could be fashioned by external influences such as family, tradition, religion, culture and community. Just as Nussbaum notes that 'too many women think they are free when in fact they are not; they take for granted a particular ordering of society or family, and fail to see that the order is unjust'.³³¹ Hence the argument that women veil for reasons of modesty and not through any other form of compulsion through free choice is fallible, as how can a choice be free if it is imposed by

³²⁶ Marshall, 'Conditions for Freedom?: European Human Rights Law and the Islamic Headscarf Debate', supra (n 318) 637

³²⁷ Ibid

³²⁸ The prohibition of torture is found in the Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); European Convention on Human Rights (1950); American Convention on Human Rights (1978); African Charter on Human and People's Rights (1981); UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987; Inter-American Convention to Prevent and Punish Torture 1985

³²⁹ Law no. 2010-1192 of 11 October 2010

³³⁰ *S.A.S. v. France [GC]*, supra (n 29)

³³¹ Cited in Phillips, supra (n 26) 108

religion? Then there are those who veil in order to attract a prospective marriage partner and then remove the veil post marriage, which would also not be a free choice as it is fuelled by external expectations. Thus for the negative concept of freedom the real question is 'what is the area within which the subject...is or should be left to do or be what he is able to do or be, without interference by other persons'?³³² That is why Taylor refers to this negative freedom as an 'opportunity concept'.³³³ Berlin further clarifies that 'Freedom is the opportunity to act, not action itself'³³⁴ and that freedom is determined by 'the number of doors open to me' suggesting that the more doors that are open, regardless of whether the person goes through any of them, or even desires to go through any of them, the more free the person is.³³⁵ Thus freedom in this sense is about having a number of different options open to a person.

This leads to the question of whether a woman's choice is indeed free if it is made under oppressive conditions or not and made in circumstances that are in her real interest? For example, the woman may want to veil through choice but the state is denying her that freedom. This would correlate to the argument propagated by the oppression discourse that veiling is a patriarchal imposition and even if the women think that they are making a free choice in absence of external influences, it is still not a choice as it is not in their real interest. But such an argument fails to realise that those who oppose the veil would be complicit in limiting women's freedom as they would be acting as external agents who are pushing the prohibition in the name of emancipating veiled women; when in reality they would be limiting the freedom of those who do veil through choice.

Veiling and choice

One of the most contentious issues surrounding veiling by Muslim women has been the question of whether women who veil do so through their own free willed choice or not? This is a dimensional issue that has dominated not only the discourse on the veil but feminism generally. The matter of choice involves substantial vectoring on part of the individual woman and is imperative when examining the purpose and effects of veiling. If she chooses not to veil then there are a number of social implications for her, for example what will the community and her family think? What about the visibility of her religiosity? Will it affect her prospective marriage prospects? If the woman then takes these factors into account and then decides to

³³² Berlin 121

³³³ Charles Taylor, 'What's Wrong with Negative Liberty?' in *In the Idea of Freedom: Essays in Honor of Isaiah Berlin* (Oxford University Press 1979) 177

³³⁴ Berlin xii

³³⁵ Ibid 191

veil, would that be exercising her choice? Of course if she adopts veiling then it is at least considered an option, rather than simply being coerced. However, either option questions true choice as one can be religiously imposed and the other as a result of socialisation. Hirschmann argues, 'patriarchy and male domination have been instrumental in the social construction of women's choices.... liberty must begin from the basic understanding that the context in which women live constrains women's choices more than it does men'.³³⁶ Here it has to be acknowledged and understood that veiling has different meanings in different contexts, the Male Tuareg veil is different from female veiling, the social status veil in Oman is different from the religiously inspired, veiling in Iran, Afghanistan and Saudi Arabia is different to Pakistan and veiling in European states raise a myriad of different reasons including modesty, expression of identity, resistance to modernity, a fashion statement, as a means of rejecting or attracting the right marriage partner, as a method of self- imaging and as a symbol of culture. Thus veiling cannot and must not be considered as a monolithic entity otherwise essentialism from both the oppressive and the emancipatory discourse cannot be reconciled.

It has to be borne in mind that there is crucial difference between those women who veil with a clear intent and purpose as opposed to those that do so because of the prescription by men. Of course it is questionable whether veiling could ever be considered a true choice as its rejection by Muslim women is considered to prevent them from being true Muslims in the eyes of the patriarchs. This diametrically opposed question has been explored by Secor who found that:

While some women felt that a true understanding of the Koran necessitated women's veiling and while others felt that they were unable to remove the veil due to their ingrained ideas of womanhood and sin, there were also those who considered themselves religious but saw veiling as a personal choice, an option they could forego without compromising their religious beliefs.³³⁷

Secor's study indicates a divide amongst Muslim women as to whether it is a religious requirement or a voluntary practice. Indeed feminists are more inclined towards acceptance of a practice chosen freely than one that is imposed. Abu Lughod uses the example of Muslim women who on receipt of a marriage proposal will pray before they consent. The reason

³³⁶ Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom*, supra (n 243) 200

³³⁷ Anna Secor, 'The Veil and Urban Space in Istanbul: Women's Dress, Mobility and Islamic Knowledge' (2002) 9 *Gender, Place & Culture* 5, 19

behind praying is explained by Lazreg as who states that the decision taken by the women them will have divine blessing and although this is not a free choice idealized by international human rights Treaties or feminist discourse but it is very much about choice.³³⁸ Furthermore, influences from the family and communities are social 'binds' that need factoring in to 'any discussion on what it means to freely choose or to consent'.³³⁹ The influence of social factors is the precise element that attenuates or even negates choice in terms of the perception of free choice in a free liberal state. Mahmood argues that the Muslim women cannot be free agents if they do not have the capacity to realise their own interests, despite there being customary or traditional influences whether individual or collective.³⁴⁰

In order to delve deeper into the question of whether veiled women have a choice or not, an issue persistently raised by some liberal feminists is the alleged lack of freedom Muslim women have, which deprives them of choice. Marshall when referring to concepts such as freedom, equality and rights as tenets of classic liberalism³⁴¹ notes that 'These concepts have been translated into modern liberalism as variants of the idea that each person, by virtue of their capacity for reason, is of equal worth' she further adds that 'However, there are many different conceptions of when people are free and autonomous'³⁴² thus Marshall is more in tune with the importance of situational contexts when considering freedom of choice. A problematic with the poles of oppression and emancipation is that both fail to acknowledge alternate perspectives avoiding revelation of situational contexts and meanings ascribed to veiling by those who live through the practice and not listening to them. In respect of freedom, the danger of adopting a particular stance is that it does not acknowledge that what one discourse perceives as oppressive is considered freedom for another and unless the voices of those who wear the hijab or veil are heard by proponents of both discourses, the meaning of veiling will be projected as static, which is clearly not so. For example veiling is considered oppressive as it makes Muslim women invisible but at the same time it allows them freedom to enter public spaces and mixed sex environments giving them access to education and employment prospects, which may have been denied to them, albeit through patriarchal family structures. Similarly as evidenced in the first chapter, some women wear the hijab or the veil in defiance of parental wishes against veiling, whilst some may adopt the practice in

³³⁸ Lila Abu-lughod, *Do Muslim Women Need Saving* (Harvard University Press 2013) 212

³³⁹ *Ibid* 215

³⁴⁰ Saba Mahmood, 'Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival' (2001) 16 *Cultural Anthropology* 202

³⁴¹ Marshall, 'Conditions for Freedom?: European Human Rights Law and the Islamic Headscarf Debate', *supra* (n 318) 636

³⁴² *Ibid*

order to comply with male specified requirements of maintaining family honour and respect in front of the family and Muslim community. The motivations behind such oppositions can only be understood by listening to and acknowledging the voices of those who veil by both discourses and not silencing them through inscribing fixed meanings to veiling, thereby adding objective truth to the knowledge production on veiling.

Choice and false consciousness

The ability of Muslim women to make choices about how they will dress and make such decisions through some kind of a rational method is highly dependent upon them not only being able to identify but to choose what is in their best interests. This is one of the most contentious issues amongst those who contest the veil; this is so because there is a level of social conditioning that plays a part in that choice. Social constructions play a powerful role in dominating choices, even though they may not appear as directly external to the agent and though the veiled woman may know what she really prefers, the forces of her social construction can modify her desires in the sense that they become socially formed. In other words she mistakenly thinks she desires to veil, a Marxist concept referred to as 'false consciousness' described by Engels in his letter to Mehring:

Ideology is a process accomplished by the so-called thinker consciously indeed but with a false consciousness. The real motives impelling him remain unknown to him; otherwise it would not be an ideological process at all. Hence he imagines false or apparent motives. Because it is a process of thought he derives its form and its content from pure thought, either his own or his predecessors.³⁴³

This is an allegation levelled frequently by those who oppose veiling at those women who say that they veil through choice. In this sense women are making choices that are not real choices but only identifying their socially formed desires in that they are mistaken in what they desire under 'false consciousness'. And furthering these desires which are socially conditioned, help internalise the oppressive practice of veiling, which women either become ignorant to or tacitly accept without any questioning of their social structures and knowledge of viable alternatives. For example veiled women who do not question the meaning attributed to religious texts by men and do not even consider or question the lack of female interpretations of Qur'anic texts considered as imposing modesty rules or indeed the option of not veiling at all. Khan also gives an example of false consciousness when she states:

³⁴³ Raymond Williams, *Marxism Literature: Marxist Introductions* (New edn, Oxford Paperbacks 1977) 65

Many women choose to wear the hejab, but for many women their lives are set up in such a way that the hejab is the only logical choice. Their families expect it of them, and the community they belong to reinforce the notion of the authentic Muslim woman as one who wears the hejab.³⁴⁴

The exercise of free choice in these circumstances is considered to be lacking³⁴⁵ and according to Marshall, this interpretation 'actually entrenches [veiled women's] lack of freedom' and leads to acceptance of 'wants and preferences that have developed through living in patriarchal societies'.³⁴⁶ Feminists such as Mackinnon refer to such state of affairs as false consciousness and a denial of agency.³⁴⁷ From a liberal feminist perspective these women do not possess any power, lack autonomy and simply become docile victims of their culture, which inhibits their real freedom that can only be gained with the acquisition of gender equality.³⁴⁸ For example this can happen when a supposedly the chosen veil can become a coerced veil since women are expected to live up to patriarchally defined norms of what a Muslim woman should be. Thus an initial autonomous decision to wear the veil, can impact on future autonomy, a point starkly put by Laborde:

If the actual choice opened to young Muslim women is either to wear a headscarf and be shown respect by her male peers, or opt for Western clothing and be subjected to abuse and harassment, they may seek to maintain their dignity and self-esteem by convincing themselves that their choice is a free one.³⁴⁹

Muslim women's claims that they act as free agents when they decide to veil is rebutted by some radical and liberal feminists such as Mackinnon and Okin for whom veiling is one of the methods used by men in order to ensure that women hold on to an inferiority complex and is

³⁴⁴ Shenaz Khan, 'The Veil as a Site of Struggle: The Hejab in Quebec' (1995) 15 *Canadian Women Studies* 146, 150

³⁴⁵ Maureen Ramsay, *What's Wrong with Liberalism* (Leicester University Press 1997) 55

³⁴⁶ Jill Marshall, 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14 *Res Publica* 177, 187

³⁴⁷ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 115-117

³⁴⁸ Marshall, 'Conditions for Freedom?: European Human Rights Law and the Islamic Headscarf Debate', *supra* (n 318) 638

³⁴⁹ Cecile Laborde, 'Female Autonomy, Education and the Hijab' (2006) 9 *Critical Review of International Social and Political Philosophy* 351, 358

thus a symbol of oppression. According to MacKinnon³⁵⁰ and Okin's³⁵¹ views on internalising oppression even if Muslim women believe that they wear the veil through choice, that is false consciousness because how they perceive themselves and the imposition of unequal gendered roles upon them are a coercive feature of their surrounding culture.

If Muslim veiled women are surrounded by others who veil as a religious symbol of modesty required by Islam and never question that obligation, then the authenticity of that choice is under question and potentially false. However a natural question arising here is that if Muslim women who veil or wear the hijab are victims of false consciousness then how it can be discerned that they would not have chosen to cover if they did indeed have a free choice. Thus the argument is premised on the notion that the choice to veil is not choice recognised by those who allege false consciousness. It is arguments such as these that lead to claims of ethnocentrism and colonialism by those who defend veiling and leads to the voices of those who veil to be drowned. This muting occurs because irrespective of the veiled women's authentic free choices, they are being treated as victims of social construction who are unable to make the right choices for themselves and have to be saved from such oppression and are blamed for tolerating the hijab and the veil. The argument that these women have internalised the effect of external influences on them that expect them to veil, very much like the position of battered women who come to accept the abuse that it is a part of their life and somehow they themselves are to blame for not leaving their abusive partners.³⁵²

Thus the argument is that Muslim women who wear the hijab or the veil may not have their freedom directly limited by a form of external influence, but their desires and preferences have been internally moulded and limited in unjust ways. The 'fact that girls defend the [veil] does not make any difference [to the reality of their domination]'.³⁵³ According to Lazreg women believe to have 'freely chosen the veil, her act was perhaps not based on decisions in full knowledge of one's motivations and the consequences of one's acts, after weighing the pros and cons and consider alternatives'.³⁵⁴ Women are not free from external influences such as the 'dangers of brainwashing that subsist'³⁵⁵ as described by Ahmed who refers to the pro-veiling propaganda working through the more classical method of inception style

³⁵⁰ MacKinnon, *Toward a Feminist Theory of the State*, supra (n 347)

³⁵¹ Okin, supra (n 254) 117

³⁵² Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom*, supra (n 243) 103

³⁵³ Zelenski and Vigerie (2003) cited in Cecile Laborde, 'Female Autonomy, Education and the Hijab' (2006) 9 *Critical Review of International Social and Political Philosophy* 351, 358

³⁵⁴ Lazreg, *Questioning the Veil: Open letters to Muslim Women*, supra (n 2) 86

³⁵⁵ Botz-Bornstein, supra (n 179) 252

indoctrination: 'In contrast to the Iranian regime, which imposed veiling, the quiet revolution that the Sunni Islamists were setting in motion in Egypt was seemingly rather implanting in women the will and desire to wear the Hijab'.³⁵⁶ An example of this can be found in a study carried out by Botz-Bornstein who refers to one of her respondents who tells her story and says 'Sarah...was brainwashed into veiling at age thirteen in her religious school'.³⁵⁷ But religious indoctrination through schools or Mosques is not the only source that influences the choice to veil. Botz-Bornstein found in her study that close family members who have conservatist affiliations also play a part:

Lulwa's great uncle, who is the family's eldest, turned salafist relatively recently. Consequently, he requires all women in the extended family to veil even though the rest of the family, including Lulwa's parents seem to be against it. Lulwa tells me of her friends who get bribed into veiling by their parents, who offer them much higher allowances or other material rewards'. She offers further corroboration of such practices 'Muneera says that her father has offered her large sums of money if she adopts the veil'.³⁵⁸

Similarly Ahmed commenting on Macleod's study of veiling in Egypt states that:

The pressure for women to wear Hijab was distinctly growing. There was evidence, Macleod found, that women were being pressured not only by men in their families but also by male religious authorities. Several women now mentioned that they had decided to wear Hijab because of their local religious leaders. Others mentioned that male religious activities would cite the authority of religious men in their attempts to persuade fiancées, wives or sisters to veil.³⁵⁹

Such examples add cogency to the view that the veil is imposed by men through coercion and in some cases through material motivations. This is affirmed by Zuhur's study, where he found that women did not believe the veil was an Islamic obligation, with many claiming veiling was spreading because women were being paid to wear it by Islamist groups and funds from Saudi

³⁵⁶ Leila Ahmed, *A Quiet Revolution: The Veil's Resurgence, from the Middle East to America* (Yale University Press 2011) 116

³⁵⁷ Botz-Bornstein, *supra* (n 179) 257

³⁵⁸ *Ibid*

³⁵⁹ Ahmed, *A Quiet Revolution: The Veil's Resurgence, from the Middle East to America*, *supra* (n 356) 125

Arabia.³⁶⁰ Thus there is no categorical stance that can be adopted over whether veiling is a product of free choice or not as there are situations where it may not be directly coerced but certainly the existence of social and family influence plays a role in the choice. Similarly, simply because some women may be subject to external influences does not mean that every Muslim woman is subjected to such influences, the answer can only lie with the motivations of each individual who adopts the practice making her voice an integral part of the debate.

Authenticity of choices

The content of autonomy is accentuated in the oppression discourse and it can be acknowledged that choices made by indoctrination, coercion or manipulation are not free choices. However, an argument that seems to be overlooked by those who profess as truth holders to their convenience is what if the woman who veils had a desire to conform to religious prescriptions despite the option of not veiling and she had evaluated such an option rationally? Arguably if such a woman decides that she prefers the subservient actions and remains obedient to religious prescriptions propagated via men, then there is nothing to suggest that she is any freer or unfree for having such desires, since the main concern for free will is the mode of choice formation as opposed to the content. In such cases women should not be criticised for making the 'wrong choice' or one which would have been preferred. Rather she should be seen as an autonomous agent and even though the veil has been classed as a tool via which men have dominated or oppressed women, it can in a given context be considered a marker of religious or individual agency.³⁶¹ Just as Hirschmann says that 'I do not think that feminist freedom requires that women's decisions be respected, regardless of what they choose; feminists must support, in principle, if not politically, women's choices to oppose abortion, stay with abusers, report rape or sexual harassment, or become full time mothers and housewives'.³⁶² If women decide to choose the veil in accordance with their free will, then that decision has to be supported even though others disagree with it, just as Beaman reminds that Sometimes freedom will mean freedom to be orthodox, or to make choices that some or many of us would not make.³⁶³

Deformed desires and veiling

Deformed desires are related to the concept of autonomy which is commonly defined as self-determination or self-direction which has a direct bearing on oppression. This is because, if a

³⁶⁰ Zuhur, supra (n 279)

³⁶¹ Valerie Behiery, 'A Short History of the (Muslim) Veil' (2013) 16 *Implicit religion* 387, 391

³⁶² Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom*, supra (n 243) 237

³⁶³ Lori G. Beaman, *Reasonable Accommodation: Managing Religious Diversity* (Lori G. Beaman ed, UCB Press 2012) 216

woman's acts are primarily motivated by her deformed desires then some believe there is the possibility that she is contributing to her own oppression. Bartky describes deformed desires as those that:

Fasten us to the established order of domination, for the same system which produces false needs also controls the conditions under which such needs can be satisfied. False needs, it might be ventured, are needs which are produced through indoctrination, psychological manipulation, and the denial of autonomy; they are needs whose possession and satisfaction benefit not the subject who has them but a social order whose interest lies in domination.³⁶⁴

It is clear from Bartky that one feature of deformed desires is that their source plays a part to their deformation. The formation of such desires is attributed to unjust social conditions and that includes conditions where men hold themselves to be superior and women treated as inferiors.³⁶⁵ Elster explains the acquisition of deformed desires and their adaptation to their inferior subordinated status by using the example of the 'sour grapes' phenomena where the fox is not allowed to eat grapes and he convinces himself that they are sour and therefore adapts his preference of not eating the grapes accordingly³⁶⁶ and in the context of veiling this phenomena has been termed as an 'adaptive preference'.³⁶⁷ Similarly women who are subjected to unjust social conditions adapt their preferences to conditions that give them fewer options thereby limiting their freedom. Not all cases of unjust social conditions result in deformed desires, but social influences play a causative role. Nussbaum puts forward three generic factors that produce deformed desires found in patriarchy and form ways women are indoctrinated, manipulated and denied their autonomy. She identifies the factors as lack or false information about facts, lack of deliberation or reflection about norms and limited options.³⁶⁸

The lack of or false information can be associated with the patriarchal interpretations of the Qur'an whereby the hijab or the veil is projected by men as being obligatory when there is lack of consensus on their compulsory nature and any re-interpretations by women are treated

³⁶⁴ Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression*, supra (166) 42

³⁶⁵ Martha Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 149

³⁶⁶ Jon Elster, *Sour Grapes: Studies in Subversion of Rationality* (Cambridge University Press 1987) 109

³⁶⁷ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000); Serene J. Khader, *Adaptive Preferences and Women's Empowerment* (Oxford University Press 2011)

³⁶⁸ Nussbaum, *Sex and Social Justice*, supra (n 365) 149

with contempt. Furthermore the message sent out to women is that they need to guard their modesty by covering and deflecting the male gaze, whereas in reality the Qur'an mandates men to lower their gaze too and the burden thus lays on women and men equally. The lack of options is a factor that applies to women who veil, as there is a level of manipulation albeit not direct, from the community, religious leaders and family that exerts a certain amount of pressure on women to upkeep their modesty and enhance their piousness. This is achieved through the use of reminders of religious prescription, which warrants veiling and seclusion in order to reach higher levels of piety, even though this mandate is contested by many Muslims.

Despite these desires often conflicting with these women's other desires to promote their welfare, the result is that women refrain from entering into employment and are left content with home life at the expense of developing their intellectual capacities, thus leading to a lack of options. This does not necessarily mean these women do not care, a point MacKinnon takes up suggesting that irrespective of patriarchy's influence, women apart from the 'complete dupes' of patriarchy are concerned about their welfare.³⁶⁹ This conflict of desires here is that women do not prefer oppression or subordination to equality, but instead they simply end up desiring social roles that lead to their oppression.³⁷⁰

However, a question that remains unanswered is whether these desires belong to women and if so at what point do they become their own? According to Narayan, women make the desires their own by bargaining with patriarchy and with respect to veiling she refers to their choices to do so as containing a 'bundle of elements', some of which they want, such as those connected to their socio-religious domain and communal identities. As for those they do not want, for example where they do not have the power to 'untie the bundle' they will only choose the ones needed.³⁷¹ This suggests that women have knowledge that these desires are caused by patriarchy which is indicative of agency and her views are thus contrary to MacKinnon's who images these as 'Zombie like acquiescence to patriarchal norms with their agency completely pulverised'.³⁷²

³⁶⁹ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 180

³⁷⁰ Ann E. Cudd, 'The Paradox of Liberal Feminism; Choice Irrationality, and Oppression' in Amay Baehr. Lanham (ed), *Varieties of Feminist Liberalism* (Rowman & Littlefield 2004) 38

³⁷¹ Uma Narayan, 'Minds of their Own; Choices, Autonomy, Cultural Practices, and Other Women' in Louise M. Antony and Charlotte E. Witt (eds), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Westview Press 2002) 422

³⁷² Ibid

Indeed women make choices in patriarchal societies, but women who veil after Narayan's patriarchal bargaining of their conflicting desires perpetuating their modesty and piousness to men, are arguably also lacking in belief of their self-worth. This is because they should be the ones who should be vocal in asserting that it should be men who should change their attitudes towards those women who do not veil. In practice, even if veiled women due to their struggles with patriarchy do not fully assent to patriarchy, they are still bound by it, and conforming to patriarchy propagates women's oppression by perpetuating stereotypes which instead of benefitting, harms these women.

This stereotyping conveys messages of inferiority to women in patriarchal societies the receiver can lead to them living up to that message, thus contributing to psychological oppression by attenuating their self-determination. This is further accentuated if they are being forced to view things from a dominant culture's perspective, which could be in the case of veiled women and leads to cultivation of incapability of these women perceived as oppressed.³⁷³ Those women who then come to believe under false consciousness that Muslim woman's place is in the home looking after the patriarchal family and away from the male gaze would be supporting the oppression because she would be maintaining the harmful stereotype.³⁷⁴

A person cannot be said to have freely chosen their desires if they are a conceived through external coercion, otherwise it would be the equivalent of someone selling themselves to slavery which according to Mill's could not be done:

By selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He, therefore, defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself.³⁷⁵

Deformed desires limit autonomy because choosing them would be a paradox; you cannot use autonomy to abdicate autonomy. Coercive desires are not freely chosen by those possessing full agency because it would lead a person to act in a way they would not do but for the coercion and thus lacking self-direction, this then confers benefit to patriarchy itself instead to the agent. Veiling allows the patriarchs to control the dissemination of religious knowledge,

³⁷³ Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression*, supra (n 166) 22

³⁷⁴ Ann E. Cudd, *Analyzing Oppression* (Oxford University Press 2006) 178

³⁷⁵ David O. Brink, *Mill's Progressive Principles* (Oxford University Press 2013) 190

effectively preventing women from seeking the deeper knowledge that would allow themselves to question whether veiling is indeed compulsory and modesty enhancing, a point made eloquently by King who states 'it is not enough to ask what we know about religion, but equal attention must be paid to how we come to know what we know'.³⁷⁶

Veiling as collective and self-contribution to oppression

It is not just the self-serving religious knowledge related to veiling and the silencing of these women as well as those who attempt to re-interpret the Qur'anic that is being controlled. Some feminists are of the opinion that men are 'collectively responsible' for aspects of oppression of women. This notion introduced by May & Strikwerda was applied to issues surrounding rape but can also apply to impositions of the hijab and the veil. Men could be held collectively responsible as it is in their interest to veil women and propagate modesty requirements under Islam, as it serves them to keep women from educating themselves in religion thus allowing them greater control as holders of that knowledge. Even those men who do not impose veiling amongst their own household would benefit from the others' impositions, as it allows them to retain control of women as the head of the household, which would be a consequence of an attitudinal climate generated by veiled women on those who are unveiled encouraging them to also adopt the practice. Thus even though some men may not directly play a part in imposing religious veiling, they can be considered as harbouring oppression since they do not condemn the practice.³⁷⁷

If women due to Islamic modesty impositions remain at home then the man deemed the head of the household is put in a position of greater control over the women. And the men, who associate a woman's body with enticing the man to lose control of his sexual desires itself, can lead women to form inferior images of their bodies and also pits them against women who do not veil, who would be placed under great influence. The consequence of this is that it perpetuates the patriarchy and benefits even those who do not impose veiling in their household. Young affirms this benefit to groups who have an interest in this continued oppression 'Indeed, for every oppressed group there is a group that is privileged in relation to that group'.³⁷⁸

³⁷⁶ Ursula King, 'Introduction: Gender and the Study of Religion' in Ursula King (ed), *Religion and Gender* (Blackwell Publishers 1995) 20

³⁷⁷ Larry May and Robert Strikwerda, 'Men in Groups: Collective Responsibility for Rape' (1994) 9 *Hypatia* 134

³⁷⁸ Young, *Justice and the Politics of Difference*, supra (n 302) 42

Additionally the veiled women could be considered as contributing to their own oppression as well as encouraging it upon those who do not veil, albeit it is not directly. The strong beliefs held by veiled women on religious compliance can lead to considering that the non-veiled women belong to stereotypical roles and makes them, not only possessors of, but act out the same attitudes as the sexist men. There is however a disparity of thought as to whether women could be held blameworthy for their own oppression. There is a school of thought that does not apportion blame and who believe that women can be indoctrinated into believing in patriarchy and the associated values attached to such practices, and attribute their position to the greater divine plan, leading to these women to not only accepting their positions but also to possess those patriarchal beliefs.³⁷⁹

The opposing view by Hay is that some of these women are under an obligation to act as resistance to oppression, even though it might be limited to certain conditions, and therefore responsible for resistance. This may be the case even though it means that it may restrict their choices and would lead to attachment of blame on these victims of oppression.³⁸⁰ Hay accepts that patriarchal forces can act internally or externally, and can limit the autonomy of women, but asserts that it is not enough not to expect them to fight the oppression; if women have autonomy then they are subject to a moral obligation to resist oppression. However Hay concedes that it would be unfair to expect moral obligations of those who are incapable of fulfilling them. Even though it may be unjust to expect women to resist the acting forces of oppression, discharging the obligation can increase women's autonomy, which is important in the removal of oppression. Hay further accepts that the imposition of any moral obligation to resist adds to the burden on the oppressed woman, and therefore is an additional reason to eliminate it. Hence it is crucial that those women who have the veil imposed or question the Islamic injunctions on veiling must resist by making their voices heard through supporting polysemic readings of the sacred texts or indeed to arrive at their own interpretations following the methodology adopted by Islamic scholars. Indeed this would entail an advance in religious knowledge acquisition and may be burdensome but that is a prerogative they possess as there is no monopoly over religion and would break the mould of male religious truth holders.

³⁷⁹ Nussbaum, *Sex and Social Justice*, supra (n 365); Sandra Lee Bartky, 'On Psychological Oppression' in Sandra Lee Bartky (ed), *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge 1999)

³⁸⁰ Carol Hay, 'Whether to Ignore them and Spin: Moral Obligations to Resist Sexual Harassment' 20 *Hypatia* 94, 99

Hay's views are supported by Cudd, who states that women should resist their own oppression if they are aware of it and not under the influence of deformed desires and the instances of oppression are not so persuasive, that it would leave open the woman to any serious risk or impossibility. She does not believe that blaming the victim would be wrong, as it would be no different to a case where someone has cut their finger through carelessness with a sharp scissors, where that person would not be blamed for the carelessness, but would be blamed if they lost a hand through not caring for the cut. She asserts that neither the oppressed woman nor the one that has cut her hand is the initial cause of the harm but participates in the harm in one way or another.³⁸¹

Agentic empowerment through piety and resistance

Although Muslim women who veil are accused of lacking agency associated with choice to veil, there are circumstances where Muslim women have displaced social norms by being obedient to divinity as opposed to will and have demonstrated their agency with such compliance, such examples demonstrate the importance of the contexts and the meaning of the veil other than oppression. For example Mahmood's study of women's mosque movement in Cairo challenges not only Western norms but Islamic norms too. The women teachers belonging to the movement attend mosques, use primary and secondary texts in educating other women by 'bringing women's interpretive practices to bear upon the male exegetical tradition in new ways'³⁸² thereby mediating their beliefs as part of their internal goal that aims to achieve piety. These goals are similar to someone praying five times a day, a ritual that is considered one of the pillars of Islam. This is so even though the person praying might not actually understand the prayers themselves, it is understood that he or she will eventually cleanse their soul via the prayers. Similarly then a woman who veils may not fully understand her veiling but it is a step towards becoming pious, as Mahmood says through the act which would ultimately become a habit that the woman's 'inner quality' will develop through performativity.³⁸³ This performativity is described by Mahmood who following Judith Butler's³⁸⁴ approach states as 'a theory of subject formation in which performativity becomes one of the influential rituals by which subjects are formed and reformulated'.³⁸⁵

³⁸¹ Cudd, *Analyzing Oppression*, supra (n 374) 189

³⁸² Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press 2004) 100

³⁸³ Ibid 137

³⁸⁴ Judith Butler, *Gender Trouble* (Routledge 1999)

³⁸⁵ Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject*, supra (n 382) 162

The women believe that Islam calls all Muslims to be pious and maintain internal and external modesty, thus veiling becomes an external projection of this modesty that reminds veiled women of the inner modesty.³⁸⁶ Grima who carried out research with veiled Maltese women calls this inner spiritual engagement with the divine an 'affair of the heart' and an outward symbol of the inner piety marking out women as Muslims.³⁸⁷ Therefore veiled women are engaged in performativity in reformulating what is dear to them. Thus by veiling with the intention to enhance piety, women take control of their lives which is a form of agency, which enables women to use veiling as a form of empowerment through piety. These women's voluntary obedience is not to patriarchal systems, but to a divine authority which is voluntary, which projects the pious woman as someone who is considered respectful and autonomous. As women's Mosque movement requires this discipline, it demonstrates that although the women are subjected to relations of power by displacing the traditional Islamic norms, such as mosques being a place of worship for men only, the carving up of their own space is an exercise of agency.

Such exercise of agency where religion itself is used to overcome socio-cultural norms is consistent with Butler's concept of agency³⁸⁸ in that autonomy and agency is present when power is challenged. This is also in line with the Foucauldian principle that struggling conditions are the same ones that can lead to resistance³⁸⁹ and individuals are the vehicles of power, with the body being the site where dissent is articulated.³⁹⁰ Such conceptions of freedom take account of the effect social conditions have on individuals and promote the development of autonomy. At the same time they allow for variations and retain an element of agency, reflection and choice available in women's existing circumstances. 'Thus, women can make choices and act under circumstances in which they find themselves. This may mean that some women can make choices that others may not find palatable'.³⁹¹ Therefore one cannot discount that there are veiled women, who despite assumptions that they are living under oppressed conditions, such as imposed religious doctrines, find the circumstances they are living under are sufficient for them. Some women who veil may indeed prefer the

³⁸⁶ Ibid

³⁸⁷ Nathalie Grima, 'An Affair of the Heart: Hijab Narratives of Arab Muslim Women in Malta' (2013) 16 *Implicit Religion* 443

³⁸⁸ Ellen T. Armour and Susan M. St. Ville, *Bodily Citations: Religion and Judith Butler* (Columbia University Press 2006) 180

³⁸⁹ Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley tr, Vintage Books 1990)

³⁹⁰ Ibid

³⁹¹ Marshall, 'Conditions for Freedom?: European Human Rights Law and the Islamic Headscarf Debate', *supra* (n 318) 639

traditional family structure and extended families and might wish to remain within such cultural bounds. And these are acceptable to allow them to make such decisions, which may not be recognised as such to others. Such women's choices have to be registered as being authentic as they choose to live the way they want to in accordance with their own desires. Indeed if the liberal autonomous person is to be able to pursue her goals in the manner that accords to her desires, beliefs and values then the same autonomous agent has to be recognised as exercising choice in the circumstances that exist for her surroundings, allowing her values to be moulded. Therefore those women who veil and say they are not oppressed and veil through choice for reasons of piety or modesty have to be recognised as free agents and their voices heard by the debates.

Thus with this structure versus agency debate there are no hard and fast binaries, rather women's real life situations are dialectically interdependent, whereby nothing is an absolute result of structure and nothing is absolutely open to free will.³⁹² Abu-Lughod asserts that wearing of religious head dress should not be assumed as an indication of lack of free will. She confirms this by her ethnography of Bedouin women in Egypt who veil on a voluntary basis and are firmly committed to honour tied to the family. But the honour aspect is not the veiling but management of the household property; the women choose who they will veil for and who they will not veil for as a matter of respect that is context contingent.³⁹³ Whilst in Europe some women have stated that they 'adopted the full face veil as part of a spiritual journey'³⁹⁴ thus for those who oppose the practice of veiling to simply conclude that veiling is unequivocally related to passivity and external influence is rather arbitrary.

But if the availability or exercise of choice is truly absent or restricted, be it for reasons of forced veiling by the state, or indeed by religion itself, or by forces of patriarchy, then the argument that the veil is oppressive and should be banned in Europe can be justified by liberalists. If this view is adopted then it follows that the veil as a symbol of submission for the woman must mean that the wearer lacks the choice or the agency. This has been pointed out bluntly by the Canadian Sociologist Bilge: 'agency involves free will; no free woman freely chooses to wear the veil because it is oppressive to women; thus veiled women have no agency. The construction of veiled women as non-agentic and the veil as a tool for women's

³⁹² Euro Janson, 'Stereotypes that Define "Us": The Case of Muslim Women' (2011) 14 ENDC Proceedings 181, 185

³⁹³ Lila Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others' (2002) 3 American Anthropologist 783

³⁹⁴ Foundations, supra (n 24) 13

oppression are hence intertwined'. She further states that 'the depiction of veiled women as *devoid of agency*, which has generated criticism within feminist scholarship, making the veil a site of contention between different strands of feminism'.³⁹⁵ However, there is lack of conclusive research where women have stated that they are forced into the practice, leaving feminists to argue that those who veil through choice do it not due to true, but deformed desires.

The oppressive or emancipatory dichotomy

Earlier in the chapter the issue of veiling as a symbol of oppression and patriarchy was analysed, together with the debates surrounding freedom, choice and agency. The opposing discourses to the debate on whether veiling is a symbol of oppression suggest that it is a sign of emancipation, resistance and power. Some Eastern feminists advocate the emancipatory and resistive nature of veiling, invoking allegations of orientalism against the essentialist viewpoints of those feminists who declare that veiling is oppressive. The dilemma between the emancipatory/oppression debate and the dangers of polarisation are clearly articulated by Nussbaum who says:

To say that a practice endorsed by tradition is bad is to risk erring by imposing one's own way on others...To say that a practice is all right whenever local tradition endorses it as a right and good is to risk erring by withholding critical judgement where evil and oppression are surely present.³⁹⁶

Two of the dominant debates on veiling are between the discourses opposing and defending Muslim veiling; the former often claim that veiling is oppressive, whilst the latter claim that it can be empowering and accuse the oppositional discourse of essentialism and the otherising of Muslim women arguing that the different veiling contexts need to be understood³⁹⁷ and that those who oppose the practice want to liberate veiled women from their oppressive cultures, emphasising their cultural superiority in the process.³⁹⁸ According to Wade, this

³⁹⁵ Silma Bilge, 'Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women' (2010) 31 *Journal of Intercultural Studies* 9, 18

³⁹⁶ Nussbaum, *Sex and Social Justice*, supra (n 365) 30

³⁹⁷ Homa Hoodfar, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images' (2006) 22 *RFR/DRF* 1; Abu-Lughod, supra (n 338)

³⁹⁸ Ahmed, *Women and Gender in Islam*, supra (n 297); Hoodfar, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women' *ibid*; Meyda Yegenoglu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism* (Cambridge University Press 1998); Meyda Yegenoglu, 'Veiled Fantasies: Cultural and Sexual Difference in the Discourse of Orientalism' in Reina Lewis and Sara Mills (eds), *Feminist post-Colonial Theory* (Edinburgh University Press 2003)

points to a gendered binary where 'the West is considered modern, while the non-Western remains pre-modern with an adherence to tradition that inhibits progress. [And] because the binary is gendered, the condition of women becomes a measure of the advancement of society'.³⁹⁹

The advancement of Western society understood as being ahead of the rest of the world according to Wade is not a value neutral idea but one with connotations of a multidimensional 'positional superiority' and thus Western culture is understood to be the 'pinnacle of civilisation' which she terms 'exemplarism'.⁴⁰⁰ This exemplar is unlike ethnocentrism which simply passes judgement of superiority, but imposes a moral imperative on those cultures deemed inferior to emulate this exemplar, emphasising cultural rather than racial superiority.⁴⁰¹ It is thus no surprise that veiling has generated conflicts with those who engage in the practice being considered as oppressed and in need of saving,⁴⁰² a point highlighted by the French feminist Elisabeth Badinter, who claims that veiling represents oppression even if freely chosen. She invokes the Millian view, that one cannot freely submit to slavery, nor prefer a slothful life to one of Socratic questioning, she argues:

The choice to wear the veil...is tantamount to renouncing one's personal autonomy...even if Muslim girls appear to choose this practice autonomously, this does not mean that they are autonomous. This is because the content of their cultural norms – namely, the Muslim values of female restraint, modesty and seclusion – are opposed to personal autonomy.⁴⁰³

Orientalism

Those who support veiling as a form of emancipation frequently level claims colonialism against those who oppose the practice. Feminists such as Spivak and Ahmed influenced by the work of Said⁴⁰⁴ contend that declaring veiling as oppressive is rooted in colonialism,⁴⁰⁵ where the West was considered more advanced and culturally superior to the culturally inferior East

³⁹⁹ Lisa Wade, 'Defining Gendered Oppression in U.S. Newspapers: The Strategic Value of Female Genital Mutilation' (2009) 23 *Gender & Society* 293, 294

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

⁴⁰² Abu-Lughod, *supra* (n 338)

⁴⁰³ Cited in Monica Mookherjee, 'Affective Citizenship: Feminism, Post Colonialism and the Politics of Recognition' (2005) 8 *Critical Review of International Social and Political Philosophy* 31, 33

⁴⁰⁴ Edward E. Said, *Orientalism* (Penguin Books 1978)

⁴⁰⁵ Spivak, *supra* (n 209); Ahmed, *Women and Gender in Islam*, *supra* (n 297) 244

where women were subjugated and were 'victims of their culture'⁴⁰⁶ and in need of liberation by colonialists. Spivak has referred to such attempts as 'white men saving brown women from brown men'.⁴⁰⁷ The work of Said illustrates that the West viewed itself as enlightened, civilised and rational whereas the East was considered barbaric and backward. This view led to the construction of 'othering' of the East and gave the West the misplaced moral authority to justify its imperial conquests. Feminists such as Badinter are of the opinion that veiling is oppressive and still see Muslim women who wear the veil through the same oriental lens and the oppression discourse is reflective of that, where instead of assigning orientalism to the past, it is still continued.⁴⁰⁸ However such opinions on veiling are not just perpetuated by feminism but according to Scott⁴⁰⁹ and Al-Saji⁴¹⁰ they can be motivated by racism where liberation or lack of is used as a justification. A good example being the women recruited into the far right group English Defence League, the self-styled 'EDL Angels' yet they don't challenge patriarchy itself.⁴¹¹

According to Yegenoglu, during colonisation the Orient was quite alluring and mysterious, particularly the veiled women who signalled eroticism because of the mystery of the veil and oppression because it was a device that allowed the separation of the sexes. The mysteriousness hidden by the veil provoked erotic fantasies from the colonisers enhancing their desire to dominate. Where the 'purdah'⁴¹² acted as an erotic invitation and there was a linked desire on part of the colonisers to free the women from their barbaric culture by unveiling women and freeing them from the chains of a backward culture.⁴¹³ Hoodfar notes that between 1800 and 1950 sixty thousand books were published on the Arab orient alone in the West and their primary function was to 'depict the colonised Arabs/Muslims as

⁴⁰⁶ Marjorie Agosin, *Women, Gender and Human Rights: A Global Perspective* (Rutgers University Press 2001) 230

⁴⁰⁷ Spivak, supra (n 209) 93

⁴⁰⁸ Badinter 1989 cited in Norma Claire Moruzzi, 'A Problem with Headscarves: Contemporary Complexities of Political and Social identity.' (1994) 22 *Political Theory* 653, 671

⁴⁰⁹ Joan Wallach Scott, *Politics of the Veil* (Princeton University Press 2007) 89

⁴¹⁰ Alia Al-Saji, 'The Racialisation of Muslim Veils: A Philosophical Analysis' (2010) 36 *Philosophy and Social Criticism* 875

⁴¹¹ IB Times, 'Women Head recruitment Drive for far-Right English Defence League' *International Business Times* <<http://www.ibtimes.co.uk/women-head-recruitment-drive-far-right-english-defence-league-1437537>> accessed 28 August 2014

⁴¹² Purdah means seclusion or covering from men using the veil

⁴¹³ Leila Ahmed, 'Western Ethnocentrism and Perceptions of the Harem' *Feminist Studies* Vol 8, No 3 (Autumn, 1982) 521 <<http://www.jstor.org/stable/3177710>> accessed 26 August 2008; Ahmed, *Women and Gender in Islam*, supra (n 297)

Inferior/backwards who were urgently in need of progress offered to them by the colonial superiors'.⁴¹⁴ One example of such writing's contains the following passage:

It needs the widespread love and pity of the women of our day in Christian lands to seek and save the suffering sinful needy women of Islam. You cannot know how great the need unless you are told; you will never go and find them until you hear their cry. And they will never cry for themselves, for they are down under the yoke of centuries of oppression, and their hearts have no hope or knowledge of anything better.⁴¹⁵

This help from the West would not only free Muslim women from the traps of patriarchy but also allow them to dominate such societies.⁴¹⁶ However when the colonised societies fought back for their freedom from the colonisers, the romanticised erotic invitations of the veil was transposed as a tool of oppression and denunciation of Western values, Algeria being a prime example where forced unveiling was attempted by the French in May 1958. In Europe, especially among non-Muslims, there is a tendency to view veiled Muslim women as victims. Many of the negative opinions held by some Westerners about Islam have their roots in the distant past. However, Lord Cromer's condemnation of the treatment of Muslim women at the hands of native Egyptians is centred on veiling when he states:

It was Islam's degradation of women, expressed in the practices of veiling and seclusion that was the fatal obstacle to the Egyptian's attainment of that elevation of thought and character which should accompany the introduction of Western civilisation.⁴¹⁷

According to Cromer's views, if colonisers were to succeed in destroying 'the structure of the native societies, together with their capacity for resistance, they first had to conquer the women'.⁴¹⁸ In order for the colonisers to exert power over the Orient, unveiling women was considered the method of removing the resistance leading to a new generation of women,

⁴¹⁴ Hoodfar, 'The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images', supra (n 397) 8

⁴¹⁵ Annia Van Sommer and Samuel Marinus Zwemer, *Our Moslem Sisters: A Cry of Need from Lands of Darkness Interpreted by Those Who Heard It* (Harvard University Press 1907) 3

⁴¹⁶ Yegenoglu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism*, supra (n 398)

⁴¹⁷ Ahmed, *Women and Gender in Islam*, supra (n 297) 153

⁴¹⁸ Susanna Mancini, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism' (2012) 10 *ICON* 411

who would be released from the clutches of Islam and lead straight into the coloniser's control. The orientalist view is still pervading amongst Westerners, as Mancini citing Ahmed states:

Most Westerners *know* that Muslim women are terribly oppressed. Often, this is all they know about Islam, let alone gender relations in Middle Eastern societies. Many also think that the West should intervene in defence of Muslim women.⁴¹⁹

She further exemplifies such views by referring to comments made by Will Hutton, a leading columnist in Britain, published in the Observer newspaper in the UK:

Islam is predominantly sexist and pre-enlightenment...Thus, the West has to object to Islamic sexism whether arranged marriage, headscarves, limiting career options or the more extreme manifestations, female circumcision and stoning women for adultery.⁴²⁰

Said uses the term 'Orientalism' to describe these deep seated attitudes 'Orientalism, [is] a way of coming to terms with the Orient's special place in European Western experience'.⁴²¹ According to Mancini⁴²² who cites Yegenoglu,⁴²³ liberal feminists in the last two decades are emulating the defective 'orientalist thoughts' and have ignored valuable contributions made by female Muslim academics. This is analogous to the feminist thought during attempts by colonisers to unveil women where some feminists were deflecting the existence of their own patriarchies by focussing on the oppressed other. This position in Mancini's view is no different with the feminist liberal thought on veiling in the last two decades which under the pressure of patriarchy, being hostile to liberalism have re-focussed on the veil. This re-focus Mancini suggests, has led to liberal feminists falsely projecting repressed patriarchies women in the West are subject to, onto the cultural minority or the illiberal other. Thereby the host liberal society fulfilling its 'repressed patriarchal desires' just as 'Christian feminism in the 1970's and

⁴¹⁹ Ibid 414

⁴²⁰ Ibid

⁴²¹ Said, *supra* (n 404) 1

⁴²² Young, *Justice and the Politics of Difference*, *supra* (n 302)

⁴²³ Yegenoglu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism*, *supra* (n 398)

1980's also portrayed Judaism as the patriarchal religion par excellence, and Christianity as a feminist corrective to it'.⁴²⁴ In Mancini's view:

Blaming Islam for patriarchy does not free the occident from its roots in it, nor does it, by the same token, dislodge it from the orient. It just continues a well-known standard rhetoric...that...leads us to condemn other societies while minimising the deficiencies of our own. Hence it obstructs fruitful cross-cultural criticism, and fosters social hypocrisy, perhaps even moral obtuseness and parochialism.⁴²⁵

False projection of repressed patriarchal desires

Mancini argues that denouncing veiling as oppressive and the use of such 'feminist language in populist rhetoric is not accompanied by any serious commitment to gender equality' but rather a misuse of feminist language and rhetoric that is a part of a strategy that allows a false projection of patriarchy on to the 'other'. She bases her argument on the work of Horkheimer and Adorno's *Dialectic Enlightenment*⁴²⁶ in which they use psychoanalysis as a tool to show how anti-Semitism originated in what they termed '*false projection*'. In their explanation of false projection, a subject attributes impulses to others, the objects, which are denied as belonging to the subject, despite them being so. This involves construction of the subject's own intimate experiences as hostile which are projected falsely outward onto others, thereby destroying the intolerable within the subject.⁴²⁷ This according to Mancini allows majority societies to project onto minority cultures 'some features of their own which they seek to hide from themselves'. And since patriarchy has been construed by feminism as hostile to liberalism, the projection enables liberal majority societies to project patriarchy onto the illiberal other with the resultant that the liberal society fulfils its repressed desires.⁴²⁸

Mancini's false projection theory does indeed have a base in the post-colonialist feminist literature in which some feminists joined in imperialist missions aimed at freeing oppressed Muslim women. One example is where Ahmed notes that Lord Cromer who was tasked to colonise Egypt and unveiling Muslim women under the guise of liberating them used feminists to corroborate his emancipatory aims. However, she adds that 'this champion of the unveiling

⁴²⁴ Mancini, supra (n 418) 423

⁴²⁵ Ibid 428

⁴²⁶ Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment* (1997 John Cumming tr, Verso 1944)

⁴²⁷ Mancini, supra (n 418) 422

⁴²⁸ Ibid 423

of Egyptian women was, in England, founding member and sometime president of the Men's League for Opposing Women's Suffrage'.⁴²⁹ Although feminists were struggling with patriarchy themselves in their homelands, it was being falsely projected onto the native women of Egypt.

Similarly this deflection of gender equity is not just part of colonialist thoughts but can be traced in current trends in Britain and Germany where women are disarticulating feminism through the process of individualisation and construction of themselves as empowered selves via the 'othering' of Muslim women. In a study carried out by Scharff⁴³⁰ who asserts that although feminism is active in Western Europe, it is 'overwhelmingly unpopular' and younger women are dis-identifying with it. Her research shows that 'un-gendered and responsible individualisation' plays a part in the perception that feminism stances are not desirable in Western societies.⁴³¹ The responses from her interviewees show the individualist nature, as Larissa states:

I've always been taught to – to do whatever I want re – you know, be not necessarily because I'm a woman but because I'm an individual, you know and – no – one's ever said to me you can't do that because you're a woman.⁴³²

Whilst Christine's individualist rhetoric is evident in her statement, she is more direct with her desire not to engage with feminism:

I have opinions on what is male and what is female, but really think that actually, people are individuals, there are traits amongst gender groups, but as much – we are also individuals, so, I don't want to, I don't mind exploring, but I don't want be fixed with a group of erm thinking of, constantly thinking of women.⁴³³

Whilst the respondents in her study feel they do not need to adopt feminist stances. When it came to other cultures and particularly Muslim women, they were pictured as powerless victims, who were oppressed and in need of collective action offered by feminist politics, whilst the respondents themselves felt they were liberated drawing a dichotomy between the

⁴²⁹ Ahmed, *Women and Gender in Islam*, supra (n 297) 153

⁴³⁰ Christina Scharff, 'Disarticulating Feminism: Individualisation, Neoliberalism and the Othering of 'Muslim Women'' (2011) 18 *European Journal of Women's Studies* 119

⁴³¹ Ibid 127

⁴³² Ibid 123

⁴³³ Ibid 124

egalitarian West and the rights deficient 'other'. This dichotomy is evident in Vicky's statement when she was asked about whether she would campaign for women's issues:

Well, the thing – it's difficult living in England or well, Western Europe where it's – we've reached such a high level of kind of democratic connotation and values already. Like if – if I was in the Middle East, er, then obviously I would.⁴³⁴

It is apparent that Vicky feels that the gender regime she lives under is progressive and not in need of feminist intervention, whereas she would campaign for the lack of women's rights in the Middle East. The use of the word 'obviously' by her suggests that she feels that in the West the optimum in terms of women's rights and gender equalities have been reached, whereas in other cultures there is a void that needs addressing through feminist movements. However, Scharff's and her respondents' third wave feminist stance are reminiscent of Walter's positioning in her earlier work when she argued that the feminist agenda for women was healthy and robust and 'part of the very air they breathe'.⁴³⁵ However, just over ten years later in her work she admitted that she was wrong, and reflecting on her previous position she states:

It was easy for me to argue, and I was glad to be able to do so, that feminists could now concentrate on achieving political and social and financial equality. In the past, feminist arguments had often centred on private lives: how women made love, how they dressed, whom they desired. I felt that the time for this had passed. I believed that we only had to put into place the conditions for equality for the remnants of old-fashioned sexism in our culture to wither away. I am ready to admit that I was entirely wrong. While many women relaxed and believed that most arguments around equality had been won, and that there were no significant barriers to further progress...The rise of hypersexual culture is not proof that we have reached full equality; rather, it has reflected and exaggerated the deeper imbalances of power in our society.⁴³⁶

⁴³⁴ Ibid 128

⁴³⁵ Natasha Walter, *The New Feminism* (Virago 1999) 22

⁴³⁶ Natasha Walter, *Living Dolls: The Return of Sexism* (Virago 2010)

There is now recognition that there is a fourth wave of feminism with the younger generation taking an active part and taking their struggles on the worldwide web and the streets⁴³⁷ where use is made of social media and information technology in raising issues surrounding sexism. For example Laura Bates founded the 'Everyday Sexism Project' in 2012 whose motto has been the feminist phrase 'the personal is political' and has been so successful that in 2013 it has rolled out in 27 countries. The project allows women to write in via social media the stories of sexual harassment, discrimination and body shaming and is meant to be a 'conscious-raising exercise that encourages women to see how inequality affects them, proves these problems aren't individual but collective, and might therefore have political solutions'. In 2013 women had sent 6,000 stories about harassment and assaults targeted against them.⁴³⁸

The veil as a symbol of resistance

The veil has been used as a tool of protest and resistance against not only colonial powers attempting to modernise and Westernise Muslim societies but also against forced unveiling by leaders of Muslim states.⁴³⁹ The most symbolic use of the veil as an anti-colonialist movement is the example of Algeria. The arrival of the French in Algeria in 1830 led to it being deemed an integral part of France in 1848 bringing with it aims of civilising and instilling republican, secular, universalist values and assimilating the underdeveloped Algerians.⁴⁴⁰ The French colonial mission was 'legitimised by racist depictions of Arabs which inevitably called into question the very possibility of the civilising project.'⁴⁴¹ Local resistance to the French rule led to warfare in 1954 and in the ensuing seven year battle, women had become 'an object of attention on both sides.'⁴⁴²

For the French, just like the British in Egypt, the veil was a sign of backwardness and subjugation of women and any attempt to civilise meant unveiling of women. The veil was a symbol of Islam and a refusal to be subjected to Westernised values. It was during the struggle that the veil gained political significance and Scott notes that it was this phase that led to the

⁴³⁷ Suzanne Moor, 'The Femen Scandal Shows How Muddled we are about Men and Feminism' *The Guardian* (4 September 2013) <<http://www.theguardian.com/commentisfree/2013/sep/04/femen-men-feminism-victor-svyatski>> accessed 27 August 2014

⁴³⁸ Kira Cochrane, 'The Fourth Wave of Feminism: Meet the Rebel Women' *The Guardian* (10 December 2013) <<http://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women>> accessed 3 August 2014

⁴³⁹ Turkey, Iran and Algeria

⁴⁴⁰ Scott, *supra* (n 409) 46

⁴⁴¹ *Ibid* 46

⁴⁴² *Ibid* 61

veil first being associated with dangerous militancy.⁴⁴³ The National Liberation Front (FLN) had attained a strong influence amongst the native people and had offered a wall of resistance against the French attempt. In response, the French tried to mobilise feminine solidarity and at a pro France rally in 1958 unveiled Muslim women in public. This unveiling of Muslim women was also considered a military strategy as the FLN had been using veiled women to carry weaponry hidden behind veils and the forced unveiling would deprive the FLN of such strategies.

The use of the veil in this manner of resistance has been documented and captured very well in film media,⁴⁴⁴ academic commentary and in visual culture.⁴⁴⁵ This example of the use of veiling signifies an extension of the meaning of the veil to outside of the traditional parameters of religiosity and modesty, where Algerian women representing different socio-economic ranges joined in the resistance effort by donning the *haik*,⁴⁴⁶ playing a vital role in reclaiming their socio-cultural values.⁴⁴⁷ This resistance was further strengthened by the solidarity shown by women from the middle-class who were French educated and had never before worn the veil leading Fanon to say 'Spontaneously and without being told, the Algerian women who had long since dropped the veil once again donned the haik, thus affirming that it was not true that woman liberated herself at the invitation of France and of General de Gaulle'.⁴⁴⁸ Fanon further comments that what started as a mechanism of resistance, its value to the social group remained strong and it was worn because tradition demanded a strict separation of the sexes, although the French occupation 'was bent on unveiling Algeria'.⁴⁴⁹ This banning of the veil is described by Scott as 'a way of insisting on the timeless superiority of French civilisation in the face of a changing world'.⁴⁵⁰ According to El Guindi the French tactics led Arabs to:

Link de-veiling of Muslim women with a colonial strategy to undermine and destroy culture. The effect was the opposite of that intended by France – it

⁴⁴³ Ibid

⁴⁴⁴ Gillo Pontecorvo's *Battle of Algiers* 1965

⁴⁴⁵ Noor al-Qasimi, 'The Codes of Modesty: Reconfiguring the Muslim Female Subject' (PhD, University of Warwick 2007)

⁴⁴⁶ The haik is the veil worn by Algerian Muslim women

⁴⁴⁷ Lazreg, *The Eloquence of Silence: Algerian Women in Question*, supra (n 205) 122

⁴⁴⁸ Frantz Fanon, *A Dying Colonialism* (Avalon Travel 1994) 62

⁴⁴⁹ Ibid 63

⁴⁵⁰ Scott, supra (n 409) 89

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.⁴⁵¹

Her reasons for this carry weight, as the veil bears complex symbolic meanings and emancipation can be expressed by veiling or unveiling, it could be secular or religious and represent tradition or resistance.⁴⁵² Similarly, Iran has been at the centre of forced unveiling and veiling using the force of the law and is a prime example of the use of the veil as a method of resistance to both types of oppression and was the first country to introduce prohibition on veiling. The obsession with Westernised dress codes began in the 1920's when Iran intimated that women should follow the example of Turkey and replace the veil with a kerchief. Although this was not a legal injunction for women, in 1927 a dress code for men was imposed by the Shah when the Pahlavi hat, a French emulation was declared the official head dress for men. This was followed in 1936 by the legal prohibition of the female veil carrying a penalty for those failing to obey the law. The prohibition was enforced by the police and socially it became increasingly difficult for women to enter public places and gain employment if they wore the veil. However, the compulsory unveiling was relaxed after Reza Shah's abdication but was still a barrier to climbing the social ladder. It became a symbol of backwardness and a visible marker of class.

In the 1970's the hijab was represented as a virtuous symbol to the Pahlavis as a rejection of their rule and as a symbol of resistance to the forced Westernising efforts and many middle class women voluntarily took up the hijab. However, on return from exile of Ayatollah Khomeini in March 1979, the intention of the new regime was to rid of all Westernisation and the same women once again took to the streets, except this time they were protesting against the forced veiling. But it was too late and the hijab became compulsory and an offence punishable by seventy four lashes if seen in public uncovered. Betteridge summarises the use of the power of hijab as a symbol of protest:

Just as Reza Shah unveiled women before the Islamic revolution the Islamic republic veiled women after the revolution....the enforcement of Hijab can be as

⁴⁵¹ Guindi, supra (n 34) 170

⁴⁵² Ibid 172

empowering as its ban. Whilst it undoubtedly restricts some women, it emancipates others by legitimizing their presence in public life.⁴⁵³

The use of the veil as a form of resistance is still evident in current times where the motivations of some women who veil is to not only resist some Western norms such as mixing of the sexes, dating, frequenting pubs and clubs, but also to resist the modern stereotypes by the West such as those held by Badinter, very much framed in Orientalist terms. Moruzzi cites her:

The veil, it is a symbol of oppression of a sex. Putting on torn jeans, wearing yellow, green, or blue hair, this is an act of freedom with regards to social conventions. Putting a veil on the head, this is an act of submission. It burdens a woman's whole life. Their fathers or their brothers choose their husbands, they are closed up in their own homes and confined to domestic tasks, etc. when I say to this to the young people around me, they change their opinions immediately.⁴⁵⁴

Such views corroborate allegations of orientalist thoughts and silences Muslim women who veil, being more concerned with speaking on their behalf as opposed to allowing them to speak for themselves. Furthermore, it 'detracts attention from gender oppression in the dominant culture'.⁴⁵⁵

Although Badinter's well-rehearsed stereotypes ring connotations of Orientalism, which supporters of veiling claim, some caution has to be exercised with such allegations as not everyone who opposes veiling images the veiled Muslim woman through an orientalist lens as evidenced by Hirschmann's and Nussbaum's work.⁴⁵⁶ The stereotypical images painted by Badinter are the type which according to Wagner, are the ones some women who veil aim to resist, by adopting the practice.⁴⁵⁷ For example Fareena Alam an editor of a leading Muslim magazine corroborates the use of the veil as a form of resistance against stereotypes:

⁴⁵³ Anne Betteridge, 'To Veil or Not to Veil: A Matter of Protection or Policy' in Guity Nashat (ed), *Women and Revolution in Iran* (Westview Press 1983) 175

⁴⁵⁴ Moruzzi, supra (n 408) 671

⁴⁵⁵ Alison Phipps, *The Politics of the Body* (Polity 2014) 54

⁴⁵⁶ Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*, supra (n 161); Martha Nussbaum, 'Veiled Threats' *The New York Times* (11 July 2010) <http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/?_php=true&_type=blogs&_r=0> accessed 20 October 2012; Hirschmann, 'Eastern Veiling, Western Freedom', supra (n 273)

⁴⁵⁷ Wagner and others, supra (n 95)

Modesty is only one of many reasons why a woman wears a scarf. It can be a very political choice too. I began wearing it at the age of 21, against the wishes of my family...I wanted to assert my identity and counter common stereotypes of Muslim women. A woman who wears a hijab can be active and engaged, educated and professional...Does this democratic society have any room for a British-Muslim woman like me who chooses to wear the Hijab on my own terms?⁴⁵⁸

Veiling as a form of resistance is not confined to opposing mandatory or prohibitory veiling regimes, but also acts as a form of resistance against commercial consumerism and modernity where self- imaging problems have become acute, cosmetic surgery is within reach of most, aggressive marketing of cosmetics and designer brands has become the norm. However it has to be acknowledged that this perspective of women in Islam is romanticised and over reliant on cultural relativity, furthermore it mutes women opposed to some cultural practices, who are then treated as dupes of the West.⁴⁵⁹

Stereotyping

It is generally agreed that the introduction of the term 'stereotype' and its study in the field of social sciences and social psychology started with the publication of Walter Lippmann's book *Public Opinion* in 1922.⁴⁶⁰ In his book he describes stereotypes as 'pictures in our heads' that simplify how we think about people around us recognising the value of stereotyping as a fundamental human mechanism for perceiving and making sense of the world.⁴⁶¹ These pictures would be created by cultural representations and attributing a set of characteristics to people, eliminating the need to analyse them again the next time they are encountered. Lippmann's claim was that the construction of stereotypes was false, rigid and the content incorrect. However more recent research conducted by social psychologists on stereotypes has challenged this perception and has led to academic acknowledgement that stereotypes are not always rigid, incorrect or faulty⁴⁶² and that they also exist from the stereotyped person's point

⁴⁵⁸ Haleh Afshar, 'Can I see your Hair? Choice, Agency and Attitudes: the Dilemma of Faith and Feminism for Muslim Women who Cover' (2008) 31 *Ethnic and Racial Studies* 411, 421

⁴⁵⁹ Lila Abu-Lughod, 'The Romance of Resistance: Tracing Transformations of Power through Bedouin Women' (1990) 17 *American Ethnologist* 41

⁴⁶⁰ Walter Lippmann, *Public Opinion* (Harcourt, Brace 1922)

⁴⁶¹ Cited in: Perry R. Hinton, *Stereotypes, Cognition and Culture* (Psychology Press 2000) 8; Charles Stangor, 'Volume Overview' in Charles Stangor (ed), *Stereotypes and Prejudice* (Psychology Press 2000) 6

⁴⁶² David J. Schneider, *The Psychology of Stereotyping* (Guilford Press 2005)

of view.⁴⁶³ Furthermore they are 'cognitive schemas used by social perceivers to process information about others'.⁴⁶⁴ The cognitive approach with a consideration of culture playing a role in representation of people and groups is currently the dominating approach to stereotyping.⁴⁶⁵

There have been many definitions offered since Lippmann's work and Schneider lists no less than fourteen classic ones, indicating the lack of 'real consensus' on a universal definition of stereotypes.⁴⁶⁶ All fourteen definitions cited by Schneider appear to diverge on three aspects of stereotypes: accuracy, whether the reasoning and consequences of stereotypes is bad and whether stereotypes have to be shared amongst people rather than an individual who has beliefs shared by no one else.⁴⁶⁷ Research in addressing these features of stereotypes has generated a vast amount of literature with the contemporary views emphasising the more functional and dynamic elements of stereotypes associated with simplifying the complex environment.⁴⁶⁸ An in-depth analysis of the multiple issues and contested concepts associated with stereotypes is beyond the remit of this thesis, therefore the discussion on stereotypes will be confined to the base definition as commonly referred to by the literature in this area and the type of stereotypes applicable to Muslim women who wear the hijab or the veil.

The definition that captures the essential qualities of stereotypes and contains the least number of constraining assumptions as well as common usage is that they are 'a set of beliefs about personal attributes of a group of people'.⁴⁶⁹ This shows that stereotyping becomes a method of categorising people based on cues such as sex, gender, race, age, culture, ethnicity and intellect where on encountering people their specific features are selected, followed by an emphasis of generalisations beyond those characteristics that are specific to individuals. Essentially all stereotypes have three important elements.⁴⁷⁰ Firstly, a specific characteristic identifies people or groups, for example Muslim women who veil. Secondly, additional attributes are assigned to that person or group as a whole, so with the example of Muslim

⁴⁶³ Stangor and Schaller, 'Stereotypes as Individual and Collective Representations' in Charles Stangor (ed), *Stereotypes and Prejudice* (Psychology Press 2000) 64

⁴⁶⁴ John F. Dovidio and others, 'Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview' in John F. Dovidio and others (eds), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination* (SAGE 2010) 6

⁴⁶⁵ Hinton, *supra* (n 461) 26

⁴⁶⁶ Schneider, *supra* (n 462) 16-17

⁴⁶⁷ *Ibid* 17

⁴⁶⁸ Dovidio and others, *supra* (n 464)

⁴⁶⁹ Richard D. Ashmore and Frances K. Del Boca, 'Sex Stereotypes and Implicit Personality Theory' in David L. Hamilton (ed), *Cognitive Processes in Stereotyping and Intergroup Behaviour* (Hillsdale 1981) 16

⁴⁷⁰ Hinton, *supra* (n 461) 7

veiled women this extra characteristic would be that veiled Muslim women are oppressed. Finally, once a person or group has been identified with the original meaningful characteristic i.e. veiled Muslim women, the additional characteristic that she is oppressed is applied to her with the inference that like all other Muslim women who veil, this veiled Muslim woman is oppressed too. It is through this process of categorisation or grouping that stereotypes emerge.

Categorisation based on characteristics or traits is not always negative and although people tend to perceive stereotypes as such but they can be positive too.⁴⁷¹ For example women can be stereotyped negatively as being weak, but positively as being caring. But this lack of neutrality leads those who place others in groups as positively identifying their own group belonging as more worthy than others, creating group bias. This is particularly so when the group being stereotyped and one that is doing the stereotyping has differences based on culture, religion and women's choices. This is evident in the oppression versus emancipatory polarities, where the binaries start to take greater prominence in their respective discourses as 'the actual differences between groups may be detected and then become accentuated and magnified'.⁴⁷² A consequence of the construction of such 'group realities' is that they ignore individual subjectivities, reflecting ethnocentric beliefs, rather than objective reality.⁴⁷³ This coupled with group hierarchy and power dynamics is what results in oppressive effects on groups and individuals, thereby making stereotypes particularly harmful for Muslim women who wear the hijab or the veil. The power in this case is that over discourse, where the in-group is the one that argues they have freedom of choice and are liberated whilst the out-group comprises of those women who veil, whose choices are not real choices and who are oppressed.

Since the thesis is about women who wear the hijab or the veil, it is the gender stereotype that applies. Ashmore and Del Moca define gender stereotypes as 'the structured set of beliefs

⁴⁷¹ Schneider, supra (n 462) 19

⁴⁷² Craig McGarty, Vincent Y. Yzerbyt and Russell Spears, 'Social, Cultural and Cognitive Factors in Stereotype Formation' in Craig McGarty, Vincent Y. Yzerbyt and Russell Spears (eds), *Stereotypes as Explanations: The Formation of Meaningful Beliefs about Social Groups* (Cambridge University Press 2002) 10

⁴⁷³ Jacques-Phillipe Leyens and Stephanie Demoulin, 'Ethnocentrism and Group Realities' in John F. Dovidio and others (eds), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination* (SAGE 2010) 194

about the personal attributes of men and women⁴⁷⁴ and this includes appearance of women.⁴⁷⁵ A particular characteristic of gender stereotypes is that they are ‘pervasive’ and ‘persistent’⁴⁷⁶ posing potential harm to women depending on their localities and situations.⁴⁷⁷ Furthermore gender stereotypes degrade women when they have been denied choices on how they wish to live their own lives or when they treat ‘them in ways that do not take into account their actual situations’.⁴⁷⁸ Cook and Cusack have identified two ways of identifying the harms perpetuated by stereotypes; the first one is described by them as a ‘recognition effect’⁴⁷⁹ which infringes women’s dignity by misrecognition of their equal worth as human beings or marginalising them. Thus the refusal to recognise that women who veil can and do interact with others in public spaces and are entitled to form their own identity as in *S.A.S.* would be an example of the recognition effect. The second way is the ‘distribution effects’ which is a denial of a fair distribution of public goods. This would apply where in *Sahin*⁴⁸⁰ the applicant was denied higher education facilities whilst in *S.A.S.*⁴⁸¹ the applicant was denied her dignity as well as access to public services if veiled.

Gender stereotypes supporting gender ideologies reproduce gendered differences and facilitate the maintenance of male hegemonies and subordination of females.⁴⁸² This is done by inscribing fixed identities on women because they are not seen as individuals but belonging to a gendered group. However this gendered group would include all women and not specifically Muslim women as they are not only women, but Muslim too. Thus the specific subset of gender stereotypes that applies is what is referred to as a ‘compound gender stereotype’. Cusack and Cook define compound gender stereotypes as those that ‘that interact with other stereotypes, which ascribe attributes, characteristics or roles to different subgroups of women’.⁴⁸³ Thus traits other than gender compound gender stereotypes, for example lesbians do not make good mothers, which was the subject of a successful human rights claim

⁴⁷⁴ Cited in: Bernd Six and Thomas Eckes, ‘A Closer Look at the Complex Structure of Gender Stereotypes’ (1991) 24 *Sex Roles* 57, 58

⁴⁷⁵ Rebecca J. Cook and Sione Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2011) 20

⁴⁷⁶ *Ibid* 22

⁴⁷⁷ *Ibid* 60

⁴⁷⁸ *Ibid* 65

⁴⁷⁹ *Ibid* 59-60

⁴⁸⁰ *Leyla Sahin v. Turkey [GC]*, *supra* (n 28)

⁴⁸¹ *S.A.S. v. France [GC]*, *supra* (n 29)

⁴⁸² Mary Talbot, ‘Gender Stereotypes: Reproduction and Challenge’ in Janet Holmes and Miriam Meyerhoff (eds), *The Handbook of Language and Gender* (Blackwell Publishing 2003) 472

⁴⁸³ Cook and Cusack, *supra* (n 475) 25

under Articles 8 and 14 of the ECHR.⁴⁸⁴ In the case of veiling the oppression characteristic would apply, first of all because you are referring to women, secondly that they are Muslim and thirdly that they are veiled with the result that the second and third characteristics compounding the gender stereotype. Such stereotypes are known to reflect preconceptions of Muslim veiled women that are false and the stereotypes arise because of the way those who oppose veiling articulate such opposition by targeting patriarchy and power structures affecting Muslim women.

Stereotyping the veil by non-Muslims

The perception that veiling is oppressive is not a standpoint adopted by non-Muslims only; it is also borne by many Muslim feminists who oppose the practice.⁴⁸⁵ This highlights the divergent feminist issues cross cutting national and global contexts that cannot be separated from transnational political and economic forces.⁴⁸⁶ Although there are no comprehensive surveys of Muslim women that suggest there is dissent against veiling from within, there is limited research that does point out negative views on veiling by Muslim women. For example, research conducted using Muslim women who do not veil and their views on veiling do suggest that not every case of veiling is considered a choice based practice.⁴⁸⁷ Whilst a survey of North African women carried out in France by Elle magazine showed that eighty one percent were against wearing a veil whilst fifty one percent were opposed to hijab in state schools,⁴⁸⁸ although the value of this survey in research terms is limited. Nevertheless, this dissent extends beyond these women and there are prominent Muslim writers such as Ali Bhai Brown, who condemns veiling of young girls being trained to internalise the practice:

Parents of tiny girls with headscarves tell me they are training them to cover themselves. Informed choice is one thing, but trained choice? Or a choice where females know they will be ostracised if they don't comply?⁴⁸⁹

⁴⁸⁴ *E.B. v. France* [GC] App no 43546/02 (22 January 2008)

⁴⁸⁵ Mernissi, *The Veil and the Muslim Elite: A Feminist Interpretation of Women's Rights in Islam*, supra (n 76); Lazreg, *Questioning the Veil: Open letters to Muslim Women*, supra (n 2); Shaista Gohir, 'Britains Most Feminist Muslim: Is the Veil really a Threat to Western Culture' (2011)

<<http://shaistagohir.com/is-the-face-veil-really-a-threat-to-western-culture/>> accessed 18 August 2014; Guindi, supra (n 34); Fadela Amara and Sylvia Zappi, *Breaking the Silence* (Helen Harden Chenut tr, University of California Press 2006); Yasmin Ali Bhai Brown, 'Liberal Defenders Have Lost their Way' *The Independent* (22 September 2013) <<http://www.independent.co.uk/voices/comment/liberal-defenders-of-the-veil-have-lost-their-way-8832758.html>> accessed 19 October 2013

⁴⁸⁶ Uma Narayan, *Dislocating Cultures* (Princeton University Press 1997)

⁴⁸⁷ Nadia Fadil, 'Not - /Unveiling as an Ethical Practice' (2011) 98 *Feminist Review* 83

⁴⁸⁸ Cited in Wing and Smith, supra (n 44) 748

⁴⁸⁹ Brown, supra (n 485)

The Egyptian El-Sadaawi, a staunch proponent of Arab women's human rights articulates clearly that the veil is not only a symbol of subjugation of the Muslim woman, but it also veils her mind from liberation, she states:

The call to liberate the mind or to raise the veil from the mind...is an essential for the liberation of the Arab person, man or woman, but especially woman. For she is ruled by two authorities (inside and outside the home) which deprive her of her rights over her own mind and body from becoming the moving force behind her own deeds.⁴⁹⁰

The veil represents to the West and some Muslims a symbol of physical segregation of the sexes, which is associated with the subordination of women and according to El-Solh and Mabro gender segregation where there are separate spaces for men and women are the most extreme symbols that 'limit women's physical mobility to the home'.⁴⁹¹ Moreover, the authors recognise the role that Islam has taken in the Western psyche in filling the void left by communism 'In the Western mind, Muslim women all too often tend to conjure up a vision of heavily veiled, secluded wives, whose lives consist of little more than their homes, their children, and the other women in the harem or immediate kinship circle'. This they point out, has limited relevance to the lives of the majority of Muslims today, especially those living in the West.⁴⁹² The existence of such stereotyping according to Wagner leads to Muslim women in the minority to veil that acts out a form of resistance to the negative attitudes by the majority.⁴⁹³ The prevalence and rebuttal of such stereotypes is clearly articulated in research on Muslim women's participation in Higher education carried out by Tyrer and Ahmad:

Throughout the fieldwork respondents dispelled stereotyped assumptions of Muslim women at University... leading double lives and experiencing cultural

⁴⁹⁰ Nawaal El-Sadaawi, 'The Political Challenges Facing Arab Women at the end of the 20th Century' in Nahid Toubia (ed), *Women of the Arab World: The Coming Challenge* (Zed Books 1988) 21

⁴⁹¹ Camillia Fawzi El-Solh and Judy Mabro, 'Islam and Muslim Women' in Camillia Fawzi El-Solh and Judy Mabro (eds), *Muslim Women's Choices: Religious Belief and Social Reality* (Berg 1994) 7

⁴⁹² Ibid 4

⁴⁹³ Wagner and others, supra (n 95)

clash...These representations rely on reductionist stereotypes about the alleged backwardness of Muslim families.⁴⁹⁴

The researchers conclude their study by emphasising that the ‘findings that emerged from this research interrupt and challenge dominant stereotypes about Muslim women and in doing so point both to the need to recognise the diversity among Muslim women ...and their agency’.⁴⁹⁵ This illustrates the difficulty of simply confining the issue of veiling to a binary of oppression or emancipation. Andreassen and Lettings acknowledge this and the difficulties it has caused for feminists and refer to the Danish Feminist Forum that argues that ‘Headscarves and veils must be interpreted as multifaceted practices that cannot simply be reduced to female oppression’.⁴⁹⁶

Women wear the hijab or the veil for different reasons and they argue that the motivations ‘can only be understood in relation to the woman in question’.⁴⁹⁷ The question here is not just of oppression but one that concerns those who claim veiling is emancipatory, just as Gohir, a Muslim feminist questions: ‘There are those who want to make a political statement or do it for reasons of fashion or culture or are simply going through a fad. Many have told me they feel liberated in the veil. I can’t see how the veil is liberating...’⁴⁹⁸ The arguments presented show that the meaning of veiling is fluid and cannot be singularly signified. Feminism itself is shifting dependent upon one’s polarisation and whether it is used in a global, national, cultural or a social context. This has led to a debate about veiling by those who make allegations of colonialist imaging of veiled women and those who argue it is oppressive into an inconsistent one. And as Andreassen and Lettinga note, the debate results in one that is:

Not simply about headscarves and gender equality but also about gaining hegemonic support for one’s ascribed meaning to the symbol and getting one’s version of feminism accepted as the common version.⁴⁹⁹

⁴⁹⁴ David Tyrer and Fauzia Ahmad, *Muslim Women and Higher Education: Identities, Experiences and Prospects* (Supported and funded by European Social Fund (ESF) and Liverpool John Moores University, 2006) 25

⁴⁹⁵ Ibid 33

⁴⁹⁶ Rikke Andreassen and Doutje Lettinga, ‘Veiled Debates: Gender and Gender Equality in European National Narratives’ in Sieglinde Rosenberger and Birgit Sauer (eds), *Politics, Religion and Gender: Framing and Regulating the Veil* (Routledge 2013) 28

⁴⁹⁷ Ibid 29

⁴⁹⁸ Gohir, supra (n 485)

⁴⁹⁹ Andreassen and Lettinga, supra (n 496) 30

Such difficulties are further compounded by the different frames that can be employed when discussing the regulation of veiling. Rosenberger and Sauer citing Snow & Benford define frames as 'interpretive schemata that signifies and condenses the "world out there" by selectively punctuating and encoding objects, situations, events, experiences, and sequences of action in one's present environment'.⁵⁰⁰ Rosenberger and Sauer highlight eleven major⁵⁰¹ and thirty two sub frames⁵⁰² associated with veiling, which not surprisingly lends to the difficulty of the adoption or the veracity of any one position, as attempted by the debate on the oppressive or emancipatory nature of veiling. Therefore inscribing negative and positive stereotypes of oppression and emancipation respectively overlooks the individual subjectivities of those who veil and silencing of such Muslim women by both discourses.

Using native informants to affirm the oppressive veil

There are many strands that play informative roles in the feminist discourse on veiling and immersed in the discourse, although muted, are the veiled women whose voices are replaced by those Muslim women who toe the oppression discourse. Bilge labels such women as 'accredited insiders'⁵⁰³ or as the post-colonial literature refers to, as the 'oriental insiders' or 'native informants'. The discourse surrounding veiling deploys many Muslim women who have been put forward to convey to the world that the practice of veiling is oppressive and that the arguments put forward by those who oppose the practice are cogent. The fact that these women are Muslim and/or have experience of Islam and supposedly have managed to free themselves from the clutches of Islam, has been used as a means of corroborating and modulating arguments put forward by those who oppose veiling. However it is the women who veil who should be the most important entity of the debate, yet there are few whose voices are actually heard in the West⁵⁰⁴ and those who are placed to speak on their behalf 'are increasingly loaded and are likely to represent those with educational and social privilege'.⁵⁰⁵ Furthermore those voices that air their own personal accounts have a tendency to belong to what Phipps calls the 'victim discourse around women' whereby a sizeable group of 'experts' or 'native informants' present or portray the oppression of women.⁵⁰⁶

⁵⁰⁰ Rosenberger and Sauer, supra (n 10) 4

⁵⁰¹ Citizenship, Europeaness/Westernism/Modernity, Gender/Emancipation, Identity, Islam as Political Ideology, Participation, Protection, Racism, Religion (State-Church Relations), Rights, State-Market Relations.

⁵⁰² Each of the 11 major frames contain further sub-frames

⁵⁰³ Bilge, supra (395) 16

⁵⁰⁴ Wing and Smith, supra (n 44)

⁵⁰⁵ Phipps, supra (n 455) 61

⁵⁰⁶ ibid

Ayaan Hirsi Ali

One such native informant is the controversial Ayaan Hirsi Ali, a Somali born Muslim who became an Atheist when she went to the Netherlands as a refugee in 1992 allegedly under threats of a forced marriage. On gaining asylum in the Netherlands she worked as a translator in various women's shelters and graduated in political science. She entered Dutch politics, first joining the Labour party (PvdA) and then switching to the Liberal party (VVD) on the back of which she became a member of the Dutch Parliament in 2003. Ali became well known for her radical standpoints on Islam's treatment of women and Islam per se and has published a number of books condemning Islam as a religion and associated practices. Her Dutch citizenship was eventually revoked as it was admitted by her that she had lied on her asylum application to the Dutch authorities. On leaving the Netherlands Ali gained a position with the American Enterprise Institute in Washington DC.⁵⁰⁷ She is highly critical not only of veiling but of Islam as a religion and a social system despite as noted by Carle that 'for a while, Hirsi Ali was a member of the Muslim Brotherhood, and she covered herself from head to foot and is quoted as saying that the hijab 'had a thrill to it' and 'it made [her] feel powerful'.⁵⁰⁸

According to Ali, Muslim nations are lagging behind the West because of three reasons: firstly Muslims relationship with God is based on fear; secondly, Muslims believe that the prophet Muhammed is the only moral source; and finally, Islam is strongly dominated by a sexual morality derived from tribal Arab values.⁵⁰⁹ She professes to represent Muslim women on the basis of her experiential status at the hands of Islam and that someone has to speak on their behalf, in her work she states: 'I am determined to make my voice heard ...Muslim women are scarcely listened to, and they need a woman to speak out on their behalf'.⁵¹⁰ As a young girl she became the victim of female genital mutilation at the hands of cultural norms, which are justified by men as a requirement of religion, even though the religious justification is made through an obscure historical practice which has survived primarily in the African states.⁵¹¹ Ali had the opportunity to discern such practices from religion and could have used her experiential status to highlight the plight of women who undergo such torment in the name of

⁵⁰⁷ BBC World News, 'Dutch MP to quit amid asylum row' BBC News

<<http://news.bbc.co.uk/1/hi/world/europe/4986418.stm>> accessed 16 May 2014

⁵⁰⁸ Robert Carle, 'Who is Ayaan Hirsi Ali?' The Witherspoon Institute: Public Discourse

<<http://www.thepublicdiscourse.com/2014/04/13075/>> accessed 16 June 2014

⁵⁰⁹ Ayaan Hirsi Ali, *The Caged Virgin: A Muslim Woman's Cry for Reason* (Pocket Books 2007) xi

⁵¹⁰ Ibid 5

⁵¹¹ Unicef, *Female Genital Mutilation/Cutting:*

A Statistical Overview and Exploration of the Dynamics of Change (United Nations Children's Fund, 2013)

religion but fails to do so. Instead, she encourages women to break out of the cage of Islam, even offering coping strategies and tips for women to exit the clutches of Islam.

She further urges women to break free from the oppression suggesting that all Muslim women know that they are oppressed, devalued and docile, reminding them 'You know you are worth more than this. You think and dream about your freedom! You no longer have to tolerate oppression'.⁵¹² Ali's approach is problematic in a number of ways; she does not propagate her feminism, but rather her total stance against Islam. Instead of denouncing patriarchy universally for the benefit of all women, she targets Islam specifically as a religion. This is evident in her work:

Islam is strongly dominated by a sexual morality derived from the tribal Arab values dating from the time of the Prophet received instructions from Allah, a culture in which women were the property of their fathers, brothers, uncles, grandfathers, or guardians. Her veil functions as a constant reminder to the outside world of this stifling morality that makes Muslim men the owners of women and obliges them to prevent their mothers, sisters, aunts, sisters-in-law, cousins, nieces, and wives from having any sexual contact.⁵¹³

Patriarchy in Islam is acknowledged as discussed previously in the thesis and by Karmi notes that 'The Arab family is patriarchal and hierarchical in relation to age and sex, the old males having authority over the young and the females...In this structure sexes become extremely polarised; the man is expected to be strong and dominant and the woman is weak, dependent and inferior'.⁵¹⁴ But patriarchy is still prevalent in Western societies as noted by Walby⁵¹⁵ and as Nawal Sadawi says, it is not simply because of being Arab or Muslim:

We, the women in Arab countries, realise that we are still slaves, still oppressed, not because we belong to the East, not because we are Arab, or members of Islamic societies, but as a result of the patriarchal class system that has dominated the world since thousands of years.⁵¹⁶

⁵¹² Ali, *The Caged Virgin: A Muslim Woman's Cry for Reason*, supra (n 509) 131

⁵¹³ Ibid xi

⁵¹⁴ Ghada Karmi, 'Women, Islam and Patriarchalism' in Mai Yamani (ed), *Feminism & Islam: Legal and Literary Perspectives* (New York University Press 1996) 82

⁵¹⁵ Walby, supra (n 239)

⁵¹⁶ Cited in Karmi, supra (n 514) 82

There is cogency in Ali's arguments relating to the oppression of women and the exertion of male dominated laws imposed where men use religion as the moral authority, to impose such laws as in Saudi Arabia, Iran and Afghanistan. The intolerable and legally enforced veiling in these states is indicative of that. But to declare all women in Islam are oppressed is painting all Muslim countries and women with one broad brush of bleakness, whilst the whole of the West being expressed as free from oppressive practices is not objective. She overlooks the fact that some women may find strength from their faith and piety, where the quest for equality can come from within and not only outside of religion, a good example being 'the women's Mosque Movement' in Egypt studied by Mahmood.⁵¹⁷

There are now a number of Muslim feminists including Asma Barlas,⁵¹⁸ Riffat Hussain⁵¹⁹ and Amina Wadud⁵²⁰ who are striving to re-interpret the Qur'an, to eliminate the traditional interpretations that have allowed some men to justify their patriarchal power over women and gender inequalities. However Ali rightly refers to some deeply embedded gender inequalities which even some pious women have accepted without challenge. For example, she mentions the Turkish Imama⁵²¹ who gives an opinion of the verse in the Qur'an that men use to justify beating their wives:⁵²² 'Beating is degrading, but if there is no alternative, then it has to happen' and as pointed by Ali 'The effect of this social control is that Muslim women maintain their own oppression'.⁵²³ This is precisely the form of interpretation that is being tackled by those scholars who wish to overcome such male dominated textual interpretations.

Ali raises some important issues which Muslims find disturbing and rather than challenge those face-on which would allow oppressive practices to be addressed. They tend to avoid, something which Ali has not shied away from, and it has to be acknowledged that her experiential status gives her the moral authority to raise them in the blunt manner. However she comes across as incongruent, throughout her work she uses interchangeably labels such as

⁵¹⁷ Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject*, supra (n 382)

⁵¹⁸ Barlas, supra (n 99)

⁵¹⁹ Hussain, supra (n 101)

⁵²⁰ Wadud, supra (n 197)

⁵²¹ An 'Imama' is Muslim female worshipper who leads the prayers of women

⁵²² Verse 34 Sura Al-Nisaa: Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Picthall

⁵²³ Ali, *The Caged Virgin: A Muslim Woman's Cry for Reason*, supra (n 509) 4

‘we Muslims’ or ‘we in the West’.⁵²⁴ This makes it difficult for her to connect with Muslim women since they do not know if she is speaking as a Muslim or rather an ex-Muslim since she has become atheist or indeed whether she is speaking as a Western woman who is an Atheist. She further intimates that women who wear the hijab resist change and that hinders Muslim women generally in Europe.⁵²⁵ In this respect there are many other Muslim feminists who concur in her opinion. But it is in her work that she does not believe that Muslim women are able to make choices for themselves, and even if they do, it is false consciousness and this pervades her work as she appears to be shocked that Muslim women choose to wear the hijab:

When I visited with the women of the Turkish movement Milli Gorus, I found them assertive and clamorous, almost to the point of being aggressive. They angrily defended their own oppression: “I want to wear a hijab, I want to obey my husband” I have also met a Moroccan woman who said: “I want to wear the hijab, because Allah the Exalted commanded it”. “Well”, I respond, “if you want to do everything that Allah the exalted has said, then you will stay in your cage”⁵²⁶

For Ali the Muslim veiled woman is denied her personhood by the veil which restricts the woman’s body, attenuates her mental capacity and her destiny. This according to her leads women in suppressing their desires, becoming docile and selfless, ashamed of their bodies all of which negates their individuality:

The veil deliberately marks women as private restricted property, nonpersons. The veil sets women apart from men and apart from the world; it restrains them, confines them, and grooms them for docility. A mind can be cramped just as a body may be, and a Muslim veil blinkers both your vision and your destiny. It is the mark of a kind of apartheid, not the domination of a race but sex.⁵²⁷

Ali’s targeting of veiling is not just confined to women she perceives as being oppressed, who tolerate such oppressive practices, but is also at those Western societies who do nothing about such practices, clearly expecting veil bans to be imposed by all Western societies. She makes

⁵²⁴ Ibid 7

⁵²⁵ Ibid 30

⁵²⁶ Ibid 32

⁵²⁷ Ayaan Hirsi Ali, *Nomad: A Personal Journey Through the Clash of Civilisations* (Simon & Schuster Ltd 2011) 16

this clear when referring to her visit to the East End of London, an area inhabited by a large number of Muslims of Bangladeshi origin with many Muslim women veiling:

As we drove down White Chapel Road, I felt anger that this subjugation is silently tolerated, if not endorsed, not just by the British but by so many Western Societies where the equality of the sexes is legally enshrined.⁵²⁸

Ali professes to be an enlightened liberal woman and urges Islam to have its own *Voltaire*, yet fails to acknowledge Muslim women's self-willed choice even though she disagrees with them, a principle contrary to Voltaire's philosophy in terms of freedom 'I disapprove of what you say, but I will defend to the death your right to say it'.⁵²⁹ Ali's heightened liberal positioning that all Muslim women are oppressed, acting as their self-appointed representative and her opinion that these women need to abandon their faith and culture is received with dissent by many Muslim women. Some of whom challenge Ali speaking on behalf of them, for example, Fareena Alam the editor of the Muslim magazine *Q news* is unequivocal that Ali does not represent Muslim women:

It's obvious what I've been waiting for all my life: a secular crusader – armed with enlightenment philosophy, the stamp of liberal establishment and the promise of sexual freedom – swooping into my harem and liberating me from my "ignorant", "uncritical", "dishonest" and oppressed Muslim existence. At least that's what Ayaan Hirsi Ali thinks I've been waiting for.⁵³⁰

Alam adds that Muslim women in Europe have been fighting their negative stereotypes and are still engaged in that battle, consistently pushing boundaries and participating in important public roles, where they are able to encourage real change, albeit slowly, but surely and in any event long before the arrival of Ayaan Hirsi Ali. She rebuts Ali's opinion that the 'Western way is the only way' using herself as an example demonstrating that Muslim women in Europe have the ability to be both, European and Muslim, she states: 'As a British Muslim, for instance, I am as Western as I am anything else'.⁵³¹

⁵²⁸ Ibid

⁵²⁹ Evelyn Beatrice Hall, *The Friends of Voltaire* (Biblio Life 2009 (originally published 1906)) 199

⁵³⁰ Fareena Alam, 'Enemy of the Faith' *New Statesman* <<http://www.newstatesman.com/node/153781>> accessed 10 May 2014

⁵³¹ Ibid

Ali does not appreciate or at least fails to acknowledge that it is often faith itself that makes women realise their oppressed positions and abandoning that faith may further cause difficulties for those women who are trying to overcome patriarchy. Dissent by Muslim women against Ali's ideals that all Muslim women should exit Islam is also evident in Buruma's work who charts the murder of Theo Van Gogh, the producer and director of the film *'Submission'* made in collaboration with Hirsi Ali. He refers to an interview with a woman from a domestic violence refuge in Amsterdam who says Ali is wrong and states: 'My faith is what strengthened me. That's how I came to realise that my situation at home was wrong'.⁵³² It is worth noting that the same writer does not refer to any Muslim women who have been liberated directly due to Hirsra Ali's pronouncements on oppressive practices in Islam.

Many issues raised by Ali in her work⁵³³ including forced marriages, domestic violence, FGM, access to education, economic inequality and gender discrimination are real contemporary challenges facing Muslim women and she rightly raises these to the surface. But her chosen approach in highlighting such problems has not served her well. For example, rather than simply advocating Muslim women to leave Islam which has the effect of making the same women defensive about their religion, had she chosen to concentrate on specific practices which are oppressive, her views may have been better accepted. It is her academic approach that has had the effect of alienating other Muslim women who fled oppressive regimes and were subjected to similar experiences as herself. For example Halleh Gorashi a refugee who fled from Iran to the Netherlands writes about Ali overstepping the mark with her initial arguments related to emancipation of women in Islam:

Her arguments on the incompatibility of Islamic belief and women's emancipation were sharp. She stood up for the rights of Islamic women, who she believed were suppressed by Islamic tradition and law. I found Hirsi Ali's approach to the emancipation of Islamic women attractive and identified with her...However; my identification with Ayaan did not last long. The woman I initially considered a pioneer for the emancipation of Islamic women, turned out to hold dogmatic views that left little room for nuances. I soon realised that Ayaan had become a welcome mouthpiece for the dominant discourse on Islam...who could better

⁵³² Ian Buruma, *The Death of Theo Van Gogh and the Limits of Tolerance* (Atlantic Books 2007) 128

⁵³³ Ali, *The Caged Virgin: A Muslim Woman's Cry for Reason*, supra (n 509); Ayaan Hirsi Ali, *Infidel: My Life* (Pocket Books 2008); Ali, *Nomad: A Personal Journey Through the Clash of Civilisations*, supra (n 527)

represent the dominant view that a person with an Islamic background?...she sailed on the conservative ideas in the Netherlands that push migrants – the most marginalised group in society – even further into isolation.⁵³⁴

It is then no surprise that Ali's assertions that she represents all Muslim women are displaced because of her dogmatic views and despite having little or no support from Muslim women, she is projected as a native informant who corroborates the standpoint that Muslim women who veil are oppressed. This dissonance is also noted by Anthony:

It's fair to say that her [Ali's] audience is made up largely of white liberal males, rather than the Muslim women she wishes to liberate. In Holland, a female Muslim politician named Fatima Elatik told me: 'She's appealing to Dutch society, to middle class Dutch-origin people. She talks about the emancipation of women but you can't push it down their throats. If I could talk to her, I would tell her that she needs to get a couple of Muslim women around her.'⁵³⁵

Fadela Amara

Another 'insider' woman, just like Hirsi Ali winning accolades for her work and opinions on Muslim women who veil⁵³⁶ is the Algerian born French Fadela Amara.⁵³⁷ In the translated version of her book she is described as 'a human rights activist with both a personal and collective voice...She also speaks for a group, the children of North African immigrants in contemporary France'.⁵³⁸ The emergence of Amara as a cultural insider stems from the social problems faced by the French North African Muslims living in the socially deprived banlieues or suburbs. These banlieues according to her have been the subject of high levels of unemployment, racism, subjugation of women and young men desperately trying to assert their authority over Muslim girls by subjecting them to physical violence. Such acts lead to feminist protests and in order to act urgently a feminist group was formed and led by Fadela

⁵³⁴ Ghorashi Halleh, 'Ayaan Hirsi Ali: Daring or Dogmatic? Debates on Multiculturalism and Emancipation in the Netherlands' [2003] Focaal - Utrecht 163, 163

⁵³⁵ Andrew Anthony, 'Taking the Fight to Islam' *The Guardian* (4 February 2007)

<<http://www.theguardian.com/books/2007/feb/04/islam.religion>> accessed 12 June 2014

⁵³⁶ She won the annual award from the French National Assembly who gave her book 'Breaking the Silence: French Women's Voices from the Ghetto' the 'best political book of 2003' award and further prizes for her work on respect for human rights and secularism.

⁵³⁷ Ayaan Hirsi Ali was named by the Time magazine as one of the 100 most influential people in the world in 2005, whilst Fadela Amara received an award from the French Parliament in 2003

⁵³⁸ Amara and Zappi, supra (n 485) 1

Amara and seven others. This new movement was provocatively and intentionally named 'Ni Putes, Ni Soumises' translated 'neither whores, nor submissivees' (NPNS) of which Amara became the president and the movement is still active today.⁵³⁹

The 'neither whores' was aimed at the male gang members in the suburbs who referred to all women as whores except their mothers and 'neither submissivees' was aimed at signalling those politicians, academics and observers that just because Muslim women were oppressed, does not mean they were passive⁵⁴⁰ or 'refuse to rebel'.⁵⁴¹ The thrust of the movement was aimed at 'freeing Muslim women to speak out against rising male violence and oppression'.⁵⁴² The movement visited many community groups in the French suburbs with a view to bringing about a social and economic change in the suburbs heavily populated by immigrant communities. In February 2003 Amara accompanied by five other women and two men organised a protest march leading through twenty three different cities in France receiving endorsements and support. The march ended in Paris with thirty thousand people of different affiliations joining the procession, coinciding with international Women's day and leading to a meeting between Amara and members of the French government. The march was in response to questionnaires sent out by the group that received over five thousand responses from the different projects in the suburbs highlighting women's personal experiences of:

Mounting violence, social breakdown, ghettoization, retreat into sectarian politics, ethnic and sexual discrimination, the powerful return to tradition, the weight of myth about virginity, but also practices like excision and polygamy still [prevalent] in certain African communities⁵⁴³

For Amara, the socioeconomic issues that marginalised the Muslim women in the suburbs was further exasperated by the rise of what she describes as 'basement Islam' in the suburbs which led to policing of the behaviour of young Muslim women. One method used for regulating female behaviour of young Muslim girls was the imposition of Islamic dress codes that led to men forcing women to wear the headscarf. The term 'basement Islam' was originally coined by Nicolas Sarkozy when he was an Interior Minister in 2002 when he formed the first Muslim

⁵³⁹ Ni Putes Ni Soumises, <<http://www.npns.fr/>> accessed 14 June 2014

⁵⁴⁰ Daniel Strieff, 'For Women in France's Ghettos, a Third Option: Fadela Amara Leads Movement to End Violence' <http://www.nbcnews.com/id/12812170/#.U8rZ6_k7uSo> accessed 14 July 2014

⁵⁴¹ Amara and Zappi (n 485) 2

⁵⁴² Ibid

⁵⁴³ Ibid 111

Council in France that would represent Muslims in France, to address issues of fundamental Islam and stated that: 'What we should be afraid of is Islam gone astray, garage Islam, basement Islam, underground Islam. It is not the Islam of the mosques, open to the light of day'.⁵⁴⁴

Amara was accused by several organisations during her campaign of defending secular values which was perceived as a part of neo-colonialist project and that she was being used along with her movement by the French government⁵⁴⁵ and other French leftist intellectuals 'who support the right to difference...in defence of wearing headscarves, now banned in French Public schools'.⁵⁴⁶ But she views the headscarf as the most visible sign of 'obscurantist minority pressure'.⁵⁴⁷ According to her the woman who wears a headscarf is oppressed, alienated and symbolises the use of power by men over women.

Amara has her own typology of hijab wearers, the first type being those who wear it by choice which she says is in the 'spirit of religious practice' and as a 'banner of identity' with the 'impression of being recognised and respected'. Then there are those who use the headscarf as a form of protection from male aggression, preventing harassment from young males, but away from the suburbs remove their headscarves and don Western dress and make up. There are those who resist the wearing of the headscarves and although in the majority they become the target of male harassment facing daily insults and '...sometimes they are the first victims of rape. These women's lives are often hell'.⁵⁴⁸ The final category being is what she describes as the 'soldiers of green fascism'. These women are educated and want to show that they are emancipated, whereas in reality they are militants. Amara is not alone in highlighting the stance of the Muslim militant women, Afshar also notes that:

Islamist women are particularly defensive of the veil...many women have chosen the veil as a symbol of Islamisation and have accepted it as the public face of their revivalist position. For them the veil is liberating, and not an oppressive force. They maintain that the veil enables them to become observers and not the

⁵⁴⁴ BBC News, 'France Creates Muslim Council'

<<http://news.bbc.co.uk/1/hi/world/europe/2593623.stm>> accessed 14 June 2014

⁵⁴⁵ Amara and Zappi, supra (n 485) 16

⁵⁴⁶ Ibid 18

⁵⁴⁷ Ibid 19

⁵⁴⁸ Ibid 75

observed; it liberates them from the dictates of the fashion industry and the demands of the beauty myth.⁵⁴⁹

Amara describes herself as a practising Muslim and during the French schools headscarf controversy she was against the ban and was in favour of the expelled schoolgirls:

I was among those who said that these young women should not be excluded...we were counting on the republican school system, where they would learn to make their own choice and then to refuse the headscarf.⁵⁵⁰

Clearly for Amara the only right choice is to refuse the headscarf, as she fails to acknowledge that a young woman in education may make an informed choice that she wishes to wear the headscarf and so long as that choice is free from coercion, then that must be respected. Even though she was against the initial banning of headscarves in public schools, she later changed her position to one of being in agreement saying that 'looking back over all my encounters in France, I realise that this law was more necessary and that it was even much anticipated'.⁵⁵¹ Amara now openly and without reservation declares headscarves as being oppressive and declares that the 'veil is the visible symbol of the subjugation of women' and for those French feminists who defend veiling on the grounds of tradition, Amara feels enraged calling them 'totally contradictory'.⁵⁵² Yet at the same time she asserts that French feminism has forgotten the Muslim women in the ghettos and had shirked the 'social question' including basics such as the 'right to wear a skirt and not get raped'.⁵⁵³ She is right in alerting to such rights related to choices available to Muslim women, but conveniently ignores the fact that the same women should also have the right to choose the wearing of a headscarf. And though, the right to wear skirts should be open to the same women, if they decide on the headscarf over the skirt then that choice must be respected.

If Amara wanted to break the silence of the Muslim women in the Ghettos, she overlooked the research carried out by Gaspard and Khosrakhaver whose study of French Muslims and

⁵⁴⁹ Haleh Afshar, 'Islam and Feminism: An Analysis of Political Strategies' in Mai Yamani (ed), *Feminism & Islam: Legal and Literary Perspectives* (New York University Press 1996) 200

⁵⁵⁰ Amara and Zappi, supra (n 485) 98

⁵⁵¹ Ibid 154

⁵⁵² Rose George, 'Ghetto Warrior' *The Guardian* (17 July 2006)

<<http://www.theguardian.com/world/2006/jul/17/france.politicsphilosophyandsociety>> accessed 14 July 2014

⁵⁵³ Ibid

headscarves showed that some women self - consciously made the choice to wear the hijab in order to affirm their identity as 'being both French and Muslim, modern and Voilee, autonomous and dressed in Islamic costume'.⁵⁵⁴ They concluded that the women engaging in the practice were positively affirming their individual difference which they perceived as French racism and wanted to be visible as opposed to feeling invisible before adopting the headscarves. The research also showed that 'all forms of the headscarf worn by those young women interviewed were non-political'.⁵⁵⁵

It seems that for someone who formed a feminist protest movement whose manifesto stated 'We have had enough of others speaking for us',⁵⁵⁶ she simply wants other Muslim women she supposedly represents to accept her own opinions being the correct ones when she says: 'Personally, I believe the headscarf is nothing more than a means of oppression emanating from a patriarchal society'.⁵⁵⁷ She uses herself as the ideal yardstick for other Muslim women who wear the headscarf, professing that 'I am a practicing Muslim and I have never worn it, neither has my mother or my grandmother before me'.⁵⁵⁸ Yet by her own acknowledgement she does not refer to any discussion on the interpretation of the Qur'an or its precepts related to veiling, stating that she has no claim to do so, something which Muslim feminists are using as a strategy to overcome patriarchal practices. Not only does Amara thrust her own personal opinions guised as the collective voice of Muslim women in the French suburbs, but for someone asserting that such women lack choice or are making the wrong choices, she appears to view negatively those who do fight back male power and 'hold their own' describing them as:

Young women who want to resemble men and force others to respect them. They adopt mannish attitudes, tactics, and gear...dressing in jogging clothes and sneakers, all-purpose unisex clothes that hide their femininity...They are sometimes worse than the young men⁵⁵⁹

⁵⁵⁴ Françoise Gaspard and Farhad Khosrokhavar, *Le foulard et la République* (La Découverte 1995) 45

⁵⁵⁵ Amara and Zappi, *supra* (n 485) 24

⁵⁵⁶ *Ibid* 163

⁵⁵⁷ *Ibid* 154

⁵⁵⁸ *Ibid* 100

⁵⁵⁹ *Ibid* 70

For Amara who became a staunch defender of secularism, she considers that 'in the case of Muslim women, Islam must adapt itself to modernity'.⁵⁶⁰ She is a firm supporter of the burqa ban in France and in a talk delivered at the University of Chicago in May 2013 affirmed her opinion that the burqa is both oppressive and an assault on French republican values and blames the rise of Islamic fundamentalism in the French banlieues that led to the burqa ban.⁵⁶¹ Just like Hirsi Ali, Amara has also held high profile positions with the French government; she was the Urban Regeneration Minister under the French Prime Minister Françoise Fillon.

Unlike Amara, Hirsi Ali in an interview on Australian television was against a full burqa ban and said 'it misses the point'⁵⁶² whereas Amara was insistent to the Financial Times that full veiling which covered everything except the eyes represented 'oppression of women' and that she was 'in favour of the burka not existing in [her] country' and that it represented 'not a piece of fabric, but political manipulation of religion'.⁵⁶³ For someone who holds herself as the spokesperson on behalf of the silenced Muslim women in France, it appears that Amara is predominantly concerned with forced adoption of French secular values with the effect that those women who veil have been silenced by her. Not surprisingly Amara's analysis of veiling has served politicians against veiling very well as noted by Bowen '[F]or politicians the NPNS analysis was a pure gift'.⁵⁶⁴

The voices of the veiled and unveiled women

The reference to the use of native informant women does not dispute their subjective experiences but rather challenges the legitimacy of their belief, that they act as representatives who speak on behalf of all Muslim women who veil, considering these women have not been seconded any moral authority to do so. Not only have some Muslim women in high profile positions abandoned the voices of those who veil, but another problem for such women that has pervaded the discourse is that any attempts to challenge oppressive cultural practices adopted in the name of religion, are perceived as disregarding cultural relativity and any internal challenges are perceived as signs of disloyalty.

⁵⁶⁰ Strieff, supra (n 540)

⁵⁶¹ University of Chicago French Club, *Fadela Amara, speaking on "The Burqa Ban"* (You Tube 2013)

⁵⁶² Fora TV, *Ayaan Hirsi Ali: Banning the Burqa Misses the Point* (Fora TV 2010)

⁵⁶³ BBC News, 'French Minister Urges Burka Ban' (*BBC Europe*, 2009)

<<http://news.bbc.co.uk/1/hi/world/europe/8203290.stm>> accessed 15 July 2014

⁵⁶⁴ John R. Bowen, *Why The French Don't Like Headscarves: Islam, the State and Public Space* (Princeton University Press 2007) 216

Controversies and debates surrounding the use of Islamic head coverings initially started off with concerns over the use of the hijab in educational settings but the debate has since been steered towards full face coverings such as the veil or the burqa in the public sphere. Islamic veiling is contentious in many parts of the world where it has been used as either a form of political control⁵⁶⁵ or as a means of legal control over women by male dominated regimes.⁵⁶⁶ Europe has seen an incremental and obsessive interest in Muslim women's head coverings over the last twenty years or so. Arguably the issue of religion with its wider implications in Europe being of a greater concern has been camouflaged by the discourse on religious clothing. The values head covering embody or do not are the ones that get microscopic focus albeit to a point now where the debates are getting saturated. Politicians, intellectuals, observers and the media want to have an input in the debate whilst the women at the centre who engage in the actual practice are being silenced and ignored.

A good example of the missing voice of the women at the centre of the veiling debate is illustrated by Ardizzoni who conducted research into the presence of these women's voices in news articles and publications during the French headscarf ban discussions. She found that in the French daily newspaper *Le Monde* and two of the weekly newspapers *L'Express* and *Le Point* contained contributions from politicians, school principals, journalists, Islamic leaders who were exclusively men. The only female voice gaining any recognition was the French President's wife Danielle Mitterand.⁵⁶⁷ The French Muslim women who wore the hijab were only quoted briefly on one occasion, clearly suggesting women who are at the centre of the debate are denied a voice, and instead, their choice or resistance is overtaken by men. According to Ardizzoni the lack of women's self-representation is supportive of binary polarisations and a patriarchal discourse.⁵⁶⁸ The issue is not just of lack of women's voice but also of a dismissive attitude towards their narrative. For example Wing and Smith illustrate this from the same French debate stating:

When three young women were quoted in the paper describing their reasons for choosing to wear the veil, their words were not looked at as a re-vindication of women's voices, but were rather seen as insolent and contemptuous.⁵⁶⁹

⁵⁶⁵ As in Iran, Algeria, Egypt and Turkey

⁵⁶⁶ Saudi Arabia and Afghanistan being prime examples

⁵⁶⁷ Ardizzoni, supra (n 263) 634

⁵⁶⁸ Ibid 643

⁵⁶⁹ Wing and Smith, supra (n 44) 758

Indeed during the French headscarf affair the absence of the voices of the girls at the centre of the debates is strikingly apparent, something which Scott questions:

Although there was evidence to the contrary – that many girls had chosen the headscarf on their own initiative, indeed against the wishes of their parents – the [Stasi] commission members could not accept this as an exercise of free choice.⁵⁷⁰

A major empirical study into women who wear or wore a veil in five European countries⁵⁷¹ was carried out by different research teams at different times and in differing contexts.⁵⁷² The research is the leading study carried out into listening to the voices of those women who veil. The result of the research in all five European countries shows that there are:

Strong similarities...in a number of crucial fields. One concerns the credible assertion that they wear the face veil as a matter of free choice in their personal religious journey. Another is the finding that the face veil does not indicate a withdrawal from society. These women interact not only with family, friends and neighbours, they do not shy away from teachers, shopkeepers and any other people they come across in daily life.⁵⁷³

The study indicates towards positive evidence that husbands did not force the veil upon their wives⁵⁷⁴ and in many cases the families discouraged veiling,⁵⁷⁵ with some women especially younger girls veiling against their parent's wishes.⁵⁷⁶ Some women in the study reported that they had made an informed decision and waited until being convinced on the need to veil.⁵⁷⁷ Whilst others said that they knew veiling was not obligatory but did so in order to enhance their piety by trying to emulate the Prophet's wives,⁵⁷⁸ or to avoid the male gaze.⁵⁷⁹ For some women the veil was not worn for religious purposes but practical aesthetic reasons; to prevent

⁵⁷⁰ Scott, *supra* (n 409) 124

⁵⁷¹ Belgium, Denmark, France, the Netherlands and the United Kingdom

⁵⁷² Eva Brems, *The Experiences of Face Veil Wearers in Europe and the Law* (Eva Brems ed, Cambridge University Press 2014)

⁵⁷³ *Ibid* 12

⁵⁷⁴ Naima Bouteldja, 'France vs. England' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 133

⁵⁷⁵ *Ibid* 132

⁵⁷⁶ *Ibid* 145

⁵⁷⁷ *Ibid* 139

⁵⁷⁸ *Ibid* 140

⁵⁷⁹ Brems, 'The Belgian Burqa Ban and Insider Realities' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 82

their looks being discerned.⁵⁸⁰ Similarly there were many women who wore the veil for reasons of Islamic identity⁵⁸¹ or as a demonstration of their autonomy.⁵⁸² However, the research also showed, albeit the examples were limited, that some women veiled in order to please their husbands. But the study did appear to be frustrated by the lack of identification and voices of those women who may have been coerced into veiling, although the researchers acknowledged the difficulty in accessing such research respondents.⁵⁸³

The study also indicated strong dissent on veiling from within the Muslim community, who apportioned blame on veiled women for the negativity perpetuated against Muslims generally.⁵⁸⁴ Furthermore, veiling was viewed by some women as a cultural rather than a religious symbol and worn to maintain family respect, which affirms the lack of consensus on whether it is a religious requirement with some women veiling to comply with cultural norms.⁵⁸⁵ This research goes a long way in attenuating the stereotypical arguments forwarded by those who point out that veiling is oppressive and is adopted through lack of choice and in any event, even if the veiled women say they veil through choice, they are suffering from false consciousness. However, what is lacking in the research, although there are indications that some Muslims from within do not agree with the practice, or that it is a cultural and not a religious practice imposed by patriarchal attitudes, are the voices of those Muslim who agree that veiling is oppressive. For example Kadyja in Shirazi and Mishra's study who is of the opinion that in a Western country full veiling is unnecessary:

In a Western country, I think it is counterproductive to Islam's message and universality. As a hijabi woman, I feel uncomfortable around niqabis. If a woman feels that she needs to cover that much, she probably shouldn't leave the house at all. Being in public with such dress attracts more attention and defeats the entire purpose of hijab.⁵⁸⁶

Her comments are interesting considering she wears the hijab, which indicates that some Muslim women are of the opinion that not only is the full face veil not necessary, but it creates

⁵⁸⁰ Bouteldja, supra (n 574) 143

⁵⁸¹ Ibid

⁵⁸² Brems, 'The Belgian Burqa Ban and Insider Realities' supra (n 579)

⁵⁸³ Bouteldja, supra (n 574) 138

⁵⁸⁴ Ibid 156

⁵⁸⁵ Ibid 136

⁵⁸⁶ Shirazi and Mishra, 'Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States', supra (n 290) 53

divisions amongst Muslims in terms of creating degrees of piety. This not only exerts pressure on those who do not veil but also those who do and consider it a requirement of modesty in Islam. Similarly Sharifa is of the opinion that it is the wearing of the face veil which results in a loss of identity and not its absence. She elaborates 'the face tells a lot. Suppose a man came and said this to his wife, how do you know she is his wife? My modesty is my own [version of] modesty [Nobody should impose their definition of modesty on me.]'⁵⁸⁷ Whilst Zainab intimates that the full veil results in a loss of social interaction and gives off signals of seclusion as she states 'I don't think women should wear it. Maybe, in Saudi Arabia, you can wear it. The problem with the face veil is it makes you unapproachable. But you have to be accessible to people'.⁵⁸⁸ There are others who disagree with the hypocrisy of the face veil. For example it is not uncommon for women who veil to be seen with bright eye shadow colours, coloured contact lens and designer apparel that catch the eye rather than deflect which arguably makes veiling immodest as it is attracting more attention. Fatima elaborates on this point adding that for some veiling is cultural as opposed to religious:

They wear short skirts at parties/weddings, even though Islam specifies a woman isn't supposed to show anything between her chest and knees...they should care more about religion and show more Islamic behaviour in order for them to wear the niqab...my relatives are doing it because of culture, not religion.⁵⁸⁹

It is not only the veiled woman whose voice has been missing from the discourse on veiling, there is another group of women in much greater numbers than those veil whose voices appear to be missing from the debates on veiling and they are Muslim women who do not veil. According to Ahmed there are an estimated 90% of Muslim women who do not wear a full veil.⁵⁹⁰ In European countries there are more women who do not veil than those who do and the actions of those who fully veil have a negative impact on them. For example the internal divisions created based on the notion that the fully veiled women may be considered damaging to the unveiled women, as modesty is not just external but also internal and the influence exerted even though not directly can be great. The inroads made by unveiled women who have accultured into the host societies has been fractured by the ensuing debates on

⁵⁸⁷ Ibid

⁵⁸⁸ Ibid 54

⁵⁸⁹ Ibid 55

⁵⁹⁰ Leila Ahmed, *Muslim Women and Other Misunderstandings: An Interview with Leila Ahmed* (Pod Cast 2006) < <http://www.onbeing.org/program/muslim-women-and-other-misunderstandings/133> > accessed 27 September 2014

veiling, which considering the majority Muslims do not consider as obligatory is a practice that is being propagated by a minority of Muslim women. Furthermore, the negative stereotypes stemming from full veiling result in the fostering of harassment and an 'us versus them' division, which reverses the integration efforts made by those who do not veil. The arguments based on veiling and identity also suggest that those women who do not veil could be considered not real Muslims or that their personal identity is being questioned by veiled women.

Studies on the voices of unveiled Muslim women on veiling are rare and one such study carried out by Fadil indicates the discomfort felt by those who do not veil. For example one of her respondents shows the torment she feels over whether she could live Islam a different way, due to its influence by those who do because she doesn't veil, Leila says:

The veil, it's one of the major problems of my life it's not that it's a problem, it's that I don't understand it...I can't believe in it. It might seem incredible, because well, everybody wears it, and for everybody [it's like] you have to wear it. But I don't see its logic...What's its purpose...And to look at veiled women. And my first impression was that ...it was an instrument to annihilate the personality of women.⁵⁹¹

Whilst Leila was initially unsure about the nature of the veil, her views change to it being a tool of oppression and sexism. Similarly she was not on her own in her conclusions; Huda says that she initially started wearing the headscarf due to pressure from her parents when she was in education. But she became unconvinced of its religious utility, she elaborates:

For me the headscarf wasn't the proof of...it didn't mean that: "yeah, you are virtuous or pious because of it". I still believe in God, and I will always pray, but that headscarf is only a symbol for me...I can be faithful without the headscarf.⁵⁹²

Fadil notes that anyone who challenges the compulsory nature of the hijab is in effect challenging the dominant consensus, which means that the challenger is putting herself in a position of marginality against the Muslim orthodoxy.⁵⁹³ Although such challenges place

⁵⁹¹ Fadil, supra (n 487) 92

⁵⁹² Ibid

⁵⁹³ Ibid 98

unveiled women under immense pressure, they are precisely the type of challenges needed in order for Muslim women to challenge the religious texts and their correlation with the current veiling practices. This in effect will allow women to challenge hermeneutically the scholars who are self-appointed to be the guardians of the knowledge and interpretations of religious texts. Furthermore, if such challenges to veiling practices came from Muslim women who do not veil then some legitimate arguments raised by those who oppose veiling may not result in rebuttal by default and can only improve the position of women; those who may be the victims cultural practices under the guise of religious compulsion.

Wing and Smith highlight the dangers of ignoring the valuable narrative of women at the centre of the debate saying: 'This leaves the public unable to read and understand beyond what few words the media has allowed these women to say in public'.⁵⁹⁴ To remain outside the position of the veiled women in question, it is not difficult to arrive at conclusions regarding their freedom, choice and autonomy but these conclusions are loaded with oppressive or emancipatory viewpoints. The position of the woman who veils needs to be considered not only in the collective but in the singular too as veiling is context sensitive. This entails dealing with a number of questions such as why does a particular woman veil? Is it for reasons of modesty? Enhanced piety? Is it an expression of her communal identity? Is it as a choice of everyday attire? Is it because she wants to fuse east and west fashion? Is it as a sign of resistance to Westernisation? Or is it simply because she makes an autonomous choice? The way to address such questions without adopting strict polarities of the debate on veiling is to listen to those who wear the hijab or the veil and to take account of their individualities, differences and understand the meanings they ascribe to veiling. It is only then that these women will be seen as possessing the freedom and exercising their agency with individual narratives to tell rather than treating them as mere objects.

Veiling as a means to opposing power

Veiling has multiple contexts and one of these is that it can be used as a tool of opposition to being an object of power and the sexual male gaze and imbalance of female/male power relationship in Muslim societies:

The disparities of power between the sexes within Islam determine that male members are those who are in a position to determine and articulate the group's beliefs, practices, and interests. This limits the possibility of women belonging to

⁵⁹⁴ Wing and Smith, supra (n 44) 758

such culture to live with human dignity equal to that of men, and to live as freely chosen lives as they can. The veil, or certain types of it, thus represents unjust in-group power dynamics.⁵⁹⁵

It can be argued that veiling can lead to a reversal in power and this can be considered taking the Foucauldian approach to power, linked to knowledge and established through various practices of society, observation, categorising and putting tenets of knowledge in an order. Some people gather knowledge, describe and categorise information about others who become objects. The discourses of knowledge operate in a similar manner with certain people holding themselves as holders of truth and engaged in forming a hegemonic discourse, with the 'others' being marginalised from stating or possessing the truth. For example, Islamic scholars deem themselves as the benefactors of religious knowledge, whilst feminists who essentialise and ignore the contexts of Muslim women holding them as victims of oppression with assertions of false consciousness against those women who veil through choice. The result is that the voices of Muslim women who veil are ignored not only by Islamic scholars who act as self-proclaimed holders of truth but also by the feminist and political discourses aided by the media which constructs veiled women as objects. This leads subjects who feel more privileged and in better positions serving as experts and holders of the truth about veiled women; a case with some feminists and those 'native informants' who profess to represent Muslim women. The outcome of this privileged position is that Muslim women are inscribed with the identity of being veiled and oppressed.

Foucault stated that there are cracks in every discourse and 'where there is power there is resistance' and yet 'this resistance is never in a position of exteriority in relation to power'.⁵⁹⁶ The wearing of the veil can thus be a form of resistance against the male gaze and the existing relationship of power. There may not be an escape from the power relations between male and female or the majority/minority culture but the resistance allows the woman to take control of her identity being constructed by others. Thus the veil becomes a vehicle for resistance, identity negotiation and power reversal.⁵⁹⁷ This uses 'male language against them' and in Hirschmann's terms these women 'subvert the practice by turning its norms against

⁵⁹⁵ Mancini, (n 418) 419

⁵⁹⁶ Foucault, *The History of Sexuality: An Introduction*, supra (n 389) 95

⁵⁹⁷ Yegenoglu, 'Veiled Fantasies: Cultural and Sexual Difference in the Discourse of Orientalism' supra (n 398)

itself'.⁵⁹⁸ This strategy of resistance has been acknowledged by those who have analysed veiling and cognise that:

Power is not only oppressive but also creative: every relation of subordination and domination also creates a capacity for action and resistance, whereby dominated individuals assert their selfhood through adaptation to, manipulation or subversion of the normative order they are subjected to.⁵⁹⁹

Scott believes that the veil may be a way of adhering to community norms and asserting pride in one's identity like the adoption of the word 'nigger' by blacks in the United States. Wearing a headscarf assumes the stigmatised object as a positive attribute...and might be a variation on the slogan of the American gay-rights group Act-Up ('We're here, we're from here, get used to it').⁶⁰⁰ But it is important for those who attribute veiling as an act of resistance that the women do it on their own accord, as El-Guindi notes 'They reached this state of religiousness by *iqtina'* (conviction). No overt pressure or force was exerted'...⁶⁰¹

One method of manipulating the power relationship by those who wear the hijab or the veil is through patriarchal bargaining, which can be demonstrated by the girl who was photographed in her hijab at a Bradford City Football match jeering at the opposition players.⁶⁰² By wearing the hijab she placed herself as a pious Muslim girl amongst those she may not have been able to without it, as the community would have seen her as deviating from Islam. This participation allowed her to maintain her signal of external decency but at the same time gaining a greater freedom to act. The girl makes no attempt to distance herself from the majority society; rather the hijab becomes a means of freedom and a vehicle that allows a young woman to expand her own options. Her actions resonate with Kandiyoti's concept of bargaining with patriarchy.⁶⁰³ Her idea of bargaining with patriarchy is based on women negotiating strategies with the constraints of a patriarchal system's constraints which she calls 'patriarchal bargains'. These allow women in such situations to maximise the benefits within an oppressive system.

⁵⁹⁸ Hirschmann, 'Eastern Veiling, Western Freedom', supra (n 273) 486

⁵⁹⁹ Laborde, supra (n 349) 363

⁶⁰⁰ Scott, supra (n 409) 139

⁶⁰¹ Guindi, supra (n 34) 132

⁶⁰² Jim White, 'Why Bradford City fan in hijab holds key to the game's future' *The Telegraph* (10 January 2013) Sport <<http://www.telegraph.co.uk/sport/football/news/9792081/Why-Bradford-City-fan-in-a-hijab-holds-key-to-the-games-future.html>> accessed 20 March 2013

⁶⁰³ Kandiyoti, supra (n 245)

These bargains also influence any future or specific types of women's active or passive resistance against the oppression they face. The patriarchal bargains also serve to highlight the social constructs that oppress and what women will or will not tolerate, which helps understand how the power of men in a household operates and maintained. Thus the girl by not conforming to the practice of hijab was preventing from integrating with the main stream society and she utilised the hijab, as a symbol that enabled her to break free from the confines of Islam. Similarly there are those who have been accultured and combine religious head dress with Western dress, a phenomena that illuminates the crack in the hegemonic discourse, but that is a topic in its own right and outside the scope of this thesis.

Conclusion

It is evident from the arguments prevailing throughout the discourses of oppressive and emancipatory effects of the Muslim veil that not only is it paradoxical, but it is a shifting signifier of meanings that are dependent upon the context of those women who veil. Both discourses deploy their arguments for and contra oppression and emancipation in a binary form, overlooking the overlap and the blurring that occurs. Although there is a tendency to rebut allegations of the veil being oppressive and a tool of patriarchy that still prevails in Islamic culture, there is evidence that in some cases veiling is imposed on women due to cultural norms and not theological doctrines. Such impositions of veiling have the ability to be internalised and lead to the formation of adaptive preferences especially when young girls in Islamic schools are being made to wear the veil resulting in freedom and the ability to form real choices being denied to them. Thus the false consciousness argument, although weak and open to criticism is not totally baseless and to counter every such argument with colonialism, buries opportunities to eliminate oppressive practices that perpetuate patriarchy that denies women their agency.

Similarly those who claim Muslim veiling as oppressive need to acknowledge that although some choices can be the result of deformed desires, many women freely choose to veil for a number of reasons. Such choices cannot be deemed to have been made under false consciousness simply because one may not agree with them or due to ethnocentric bias. Otherwise it leads to the perpetuation of negative stereotypes such as veiled women need saving by the removal of the veil, which itself is a form of oppression. The use of native informants in order to legitimise arguments against opposing views and to silence those who

veil is self-serving. This does not advance the discourse to anyone's benefit resulting in loss of understanding the different reasons for veiling.

The competing and polarised positions that simply want to maintain a binary meaning of veiling are muting those women who veil with the result that a great contribution that could be made to both discourses by listening to such women is being lost. These missing links provide and explain many other meanings of the veil as well as an appreciation that one person's oppression may be another's freedom and veiling as a means of opposing power and its use to bargain with patriarchy are good examples of this. Acknowledgement of these meanings would further and unify the plight of women which would be of a greater benefit to those who veil rather than ignore them in order to enhance polarised views with a risk of leaving inequalities and oppression against women unchecked.

PART TWO

Introduction to part two

Part one of the thesis showed that the veil worn by Muslim women has situational and contextual meanings, dependent on the subjectivities of those women who wear rather than singular or universal. The religious discourse in the first part of the thesis made it evident that there is no agreement between Muslims on whether the veil is a religious duty or an object of cultural tradition imposed by male patriarchs. Part one demonstrates that Muslim women adopt veiling practices primarily for modesty reasons, which is achieved via the hijab or the veil. But this modesty requirement is imposed on women by the patriarchal readings of the sacred texts, which attempt to justify the need for controlling women's sexuality. The first part of this thesis also questions whether veiling is necessary to achieve that purpose, since the practice can lead to objectification of those women who veil, especially as the wearer of the veil can attract the male gaze instead of its intended aim of deflecting it.

Similarly the socio-feministic discourse examined shows that there are oppositional viewpoints on the Muslim veil, asserting that it is either a tool of oppression or emancipation. Both positions place reliance on the presence or absence of choice to strengthen their respective stance. Additionally, the oppression perspective offers corroboration via cultural insiders, who affirm it as a tool of oppression, while both positions inscribe gender stereotypes on Muslim women who are veiled. The first part of the thesis also showed that both socio-feministic perspectives are open to challenges on their essentialist and self-serving positions. These tensions and oppositions between the religious and the socio-feminist discourse have made it difficult to discern, whether veiling is a religious mandate or not and whether Muslim women who veil have the freedom of choice when adopting the practice. This is a core issue for the legal discourse on veiling as the determination on whether the veil is a religious duty, which is voluntarily undertaken without any coercion, is an important factor in religious freedom claims under Article 9 ECHR.

The aim of part one has been to show that the religious and the socio-feministic discourses have silenced the voices of the women, who live the veiling experience. This failure to listen to those who veil has enabled the assertion and ascribing singular meanings to the veil as the truth, by those who control the discourses or profess to represent Muslim women who veil. Such half-truths and disagreements between the binary discourses have led to many

controversies surrounding the practice in some European states. Those who oppose the practice call for legal prohibitions on the full face veil in all public spaces on the grounds of gender oppression, whilst those who support it claim protection on the grounds that it is an exercise of the right to religious freedom, placing reliance on the European Convention on Human Rights to secure the right to wear the veil publicly.

Freedom of religion is protected by Article 9 of the European Convention on Human Rights and has been declared by the ECtHR as a foundation of a democratic society and a vital constituent element of a believer's identity and conception of life.⁶⁰⁴ Part two of the thesis examines the force of this protection and examines how effective Convention rights have been in securing the rights of those who wear the hijab or the veil. The relational link between part one and part two is examining if and how, the social standpoints and negative stereotypes emerging from part one have influenced the European court of Human Rights in its jurisprudence concerning the hijab and the veil. Not all human rights under the ECHR are absolute or free from state interference and the protection human rights afford, or any state interference they allow is influenced by freedom and choice people exercise in engaging in religious practices for the purposes of an Article 9 claim. However such freedom has to be balanced against any detriment to the individual or society as a whole. Therefore the positive freedom 'to' veil as a religious right cannot be realised, unless it accompanies the negative freedom 'from' constraint or influence, which in the case of veiling can include coercion to veil by the family or the community. Such paternalist protection can be achieved by national laws prohibiting the hijab or the veil on the grounds that the practice may have a detrimental impact on others, or in order to further gender equality by prohibiting gender oppressive practices. If the veil is indeed oppressive, as claimed by the socio-feministic discourse, then the ECtHR can uphold national legal restrictions on the practice, since the court has consistently emphasised that a major objective for states is to achieve gender equality that is a key principle of the ECHR.⁶⁰⁵

Human rights laws are prone to influences from the discourses on veiling, just like the national laws can be. For example, the French government set up the Stasi Commission to receive evidence from a number of parties, including leading academics and feminists, before passing the law prohibiting the wearing or display of conspicuous religious symbols such as the hijab in public schools.⁶⁰⁶ Similarly the French Gerin Commission was established to gather evidence,

⁶⁰⁴ *Kokkinakis v. Greece* App no 14307/88, (25 May 1993) para 31

⁶⁰⁵ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 115

⁶⁰⁶ Law no. 2004-228 of 15 March 2004

before the law prohibiting concealment of the face⁶⁰⁷ was enacted. During the commission hearings Tariq Ramadan a leading Muslim academic gave evidence that the veil is not a requirement of Islam,⁶⁰⁸ whilst the French feminist Elizabeth Badinter who strongly opposes the veil, equated it with radical Islam.⁶⁰⁹ In the same way, European debates and the socio-feministic discourse can and do play a part in influencing the European Court of Human Rights, when claims are made by women who veil on the grounds of religious freedom under Article 9 ECHR.

Part two of the thesis engages in an analysis of the three key ECtHR cases, where claims of interference with the religious right to wear the hijab or the veil have been made against national laws of Switzerland,⁶¹⁰ Turkey⁶¹¹ and France.⁶¹² Through an analysis of the case-law, this part of the thesis gauges whether the ECtHR has discharged its duty to consider individual complaints by listening to the voices of Muslim women who wear the hijab or the veil. By doing so, the ECtHR would have confirmed that veiling has no single meaning and is not confined to religious duty alone. For example, it can be used as means of experimenting with or expressing one's identity too; in which case, claims by the applicants extend to other Convention rights too. Therefore this part of the thesis examines the reasoning and justifications provided by the ECtHR, in order to establish whether the court has followed the pattern of muting of women who veil, by assimilating the oppression discourse including the negative stereotypes into its jurisprudence. If this is so, then the value neutral judgement of the court is questioned when the matter before it concerns Muslim veiling, with the consequence that the court has played a part in the triple bind of silencing Muslim women who veil; first by the male orientated interpretations imposing modestly, secondly by the socio-feministic discourse articulating the oppressive or emancipatory meaning, and finally, the ECtHR by failing to listen to the women who live the experience of veiling and hold the true meaning of it. It is this relational link between the religious and socio-feministic discourses in part one and the legal discourse in part two on veiling that binds the thesis.

⁶⁰⁷ Law no. 2010-1192 of 11 October 2010

⁶⁰⁸ Grillo and Shah, *supra* (n 23) 19

⁶⁰⁹ *Ibid* 20

⁶¹⁰ *Dahlab v. Switzerland*, *supra* (n 27)

⁶¹¹ *Leyla Sahin v. Turkey [GC]*, *supra* (n 28)

⁶¹² *S.A.S. v. France [GC]*, *supra* (n 29)

CHAPTER 3 – LEGAL PROTECTION OF VEILING

Introduction

The first part of the thesis engaged in a critique of the socio-feministic perspectives associated with Islamic veiling. Whilst arguments in the previous chapters relating to whether Muslim veiling is cultural or a religious mandate was a concern with respect to whether Muslim women's choice to veil may have been free willed or a product of oppression. In this part of the thesis the jurisprudence arising under the European Convention on Human Rights (ECHR) will be critiqued and it will be demonstrated that some states have used the law to prohibit the hijab and veiling in public spaces by utilising some of the negative stereotypes, which emerged from the discourses in part one of this thesis. The use of legal force to prohibit Muslim women from wearing the hijab or the veil in public spaces has led to challenges to such restrictions under the European Convention on Human Rights primarily under Article 9 which guarantees freedom of Religion. It will become apparent that for the purposes of the law the debate about whether veiling is cultural or religious does not have the same veracity, so long as the applicant holds the belief that it is a religious requirement. This will be followed by a detailed examination of the structure and operation of Article 9 and the criteria that needs to be satisfied by a state, in order to justify interference with religious freedom. The content of this chapter is descriptive as the aim of this chapter is to set out the European human rights framework and the key interpretive principles that come into play in the case analysis in chapters four and five, as opposed to an analysis of religious freedom as a stand-alone right, which is outside the parameters of this thesis.

The European Convention on Human Rights

The European Convention on Human Rights was adopted in Rome on 4th November 1950 and entered into force in 1953 with only a handful of states ratifying the ECHR as they lacked possession of effective human rights protection systems.⁶¹³ There are now forty seven member states⁶¹⁴ of the Council of Europe who have ratified the Convention,⁶¹⁵ and as well as the

⁶¹³ Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co Ltd 1996)

⁶¹⁴ Council of Europe Treaty Office, 'Signatories and Ratifications' (*Council of Europe*, 2013) <<http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>> accessed 6 January 2013

⁶¹⁵ The members of the Council of Europe are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San

increase in signatory states, the ECHR has also been enhanced by extending in its reach in terms of rights protection by the addition of separate protocols.⁶¹⁶

The aim of the ECHR was to prevent a repeat of the human rights atrocities committed during the Second World War and afford a minimum standard of protection of human rights to citizens of states sharing similar notions of democracy, but different legal, cultural and moral norms. However it was difficult to identify a uniform set of human rights standards in Europe that reflected this diversity and as such, the ECHR was never intended to prevail over national legislatures. It was to rely on the good faith of the signatory states to give effect to it and was developed in order to strike a balance between the views held by member states on human rights and the intended uniform application of the values embodied in the Convention.⁶¹⁷

Interpreting the Convention

The fundamental rights and freedoms contained in the ECHR are grouped into three categories: absolute rights, limited rights and qualified rights. Absolute rights such as freedom from slavery⁶¹⁸ cannot be interfered with by a signatory state under any circumstances whereas limited rights contain an element of an absolute right but with some exceptions whereby the right can be limited under certain circumstances. For example the right to liberty is a limited right where a person's freedom can be curtailed by detention following a court conviction. Qualified rights are those where the balance between the individual's rights against the wider interests of the community or the state has to be struck. Any interference by the state needs to be justified by showing that it had a clear basis in law, seeks to achieve a legitimate aim and was necessary in a democratic society. Article 9 of the ECHR guarantees freedom of religion which is the subject matter of this thesis and as freedom of religion is a qualified right, there is greater discretion in the hands of the judges and the state, thus a greater scope for interpreting the right.

Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

⁶¹⁶ A protocol is a later addition to the ECHR, for example Article 1 of Protocol No. 12 is a general prohibition on discrimination and states that: The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. And no one shall be discriminated against by any public authority on any of the above grounds.

⁶¹⁷ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002)

⁶¹⁸ Article 4 ECHR

There are a number of principles used by the ECtHR in interpreting the Convention when a case is being adjudicated by the ECtHR⁶¹⁹ and these are: effective protection,⁶²⁰ positive obligations,⁶²¹ autonomous interpretation,⁶²² evolutive/dynamic interpretation,⁶²³ review and proportionality.⁶²⁴ These are further allied by the principle of legality, rule of law and procedural fairness. The principles of interpretation as applied by the ECtHR are not contained in the Convention itself but are derivatives of the teleological principle flowing from Articles 31-33 of the Vienna Convention on The Law of Treaties 1969. This lays down the basic requirements when interpreting the text of international Treaties. In *Golder v. UK*⁶²⁵ the court expressly stated that any interpretation of the Convention should be guided by Articles 31-33 of the Vienna Convention. The essence of Articles 31-33 requirements are that international Treaties are to be interpreted in good faith, an ordinary and a contextual meaning is to be accorded to the terms⁶²⁶ of the Treaty and should be interpreted in the light of its overall objective and purpose. The ECtHR adjudicates on disputes arising from the rights enshrined in the Convention against member states and has consistently stated in its jurisprudence that, the Convention is a 'living instrument,' which means it must be interpreted in the light of present day conditions in order for it to be practical and effective. Therefore sociological, moral and scientific changes in society together with evolving standards in human rights are considered by the court when applying the Convention to claims before it.

As the Convention is subsidiary to domestic laws of signatory states, the ECtHR examines the means used by the state to justify any interference with qualified rights and the court assesses the proportionality of the measures used for the means to be achieved. State authorities do not have an unfettered discretion to employ any means of interference as the ECtHR has supervisory jurisdiction, however the court can defer to national authorities a margin of appreciation, which is granting them a window of flexibility in order to comply with the ECHR.

⁶¹⁹ And also the Commission when it delivered decisions and reports before ceasing to do that in 1998

⁶²⁰ Effective protection requires the state or the court to interpret rights broadly and any exceptions allowing interference with the rights to be construed narrowly

⁶²¹ Imposes obligations on the state to actively engage in protecting Convention rights as opposed to negative obligations, which requires states to avoid breaching rights

⁶²² Allows the court to define key terms contained in the Convention in order to prevent states attaching definitions to terms in order to make it more convenient to the state

⁶²³ Allows the court to interpret the Convention to keep up with societal changes and in accordance with European commonality

⁶²⁴ The court acts as a review organ and not as an appeal court and reviews interference with rights protected by the Convention to ensure that the state uses the least intrusive method of pursuing a legitimate aim

⁶²⁵ *Golder v. United Kingdom* App no 4451/70, (21 February 1975) para 29

⁶²⁶ Unless any special meaning was intended by the parties

The ECHR and the margin of appreciation doctrine

The margin of appreciation supports the subsidiary role of the court and although the doctrine is an interpretive principle, it is found in many rights enshrined in the ECHR. Yourow in his major works on the doctrine defines it as:

The latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed, to constitute a violation of one of the Convention's substantive guarantees.⁶²⁷

The doctrine was developed to allow the Strasbourg court to defer to member states, a window of discretion as to the manner in which they implement requirements of the Convention with due regard to particular circumstances and prevalent conditions of the state in question. This is acknowledgement by the ECtHR that there are variations of legal, social and moral traditions of different states requiring appropriate deference when necessary. Essentially, when the margin of appreciation is invoked, the court is exercising self-restraint on its power of review on the basis that state authorities are best placed to settle disputes.⁶²⁸ The doctrine clearly reflects the subsidiary nature of the Convention where primary responsibility for human rights of individual citizens rests first with the state and any recourse to the ECtHR is only if the state has failed to secure the rights guaranteed by the Convention. The subsidiarity of the Convention is clearly stated in *Z and Others v. United Kingdom*⁶²⁹ and *Handyside v. United Kingdom*⁶³⁰ requiring Contracting parties to secure within their domestic

⁶²⁷ Howard Charles Yourow, *The Margin of Appreciation doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff 1996) 13

⁶²⁸ Dean Spielman, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' 2012 Centre for European Legal Studies Working Paper Series <http://www.cels.law.cam.ac.uk/publications/working_papers.php> accessed 29 March 2012

⁶²⁹ *Z and Others v. United Kingdom* App no 29392/95 (31 May 2001) 'The Court emphasises that the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity' para 103

⁶³⁰ *Handyside v. United Kingdom* App no 5493/72, (7 December 1976) '[T]he machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each contracting state, in the first place, the task of securing the rights and liberties it enshrines' para 48

jurisdiction the Convention rights and systems, where any failure by the state to provide an effective remedy is a breach of the Convention itself.⁶³¹

Although there has been a level of uniformity amongst European states in terms of the values attached to human rights, there was variation in the implementation of national human rights protection amongst many states.⁶³² For example homosexuality was acceptable in one country but a criminal offence in another. Thus the doctrine of margin of appreciation reflects the courts respect for pluralism and the remoteness of the court to settle disputes involving sensitive matters. This delicate balancing act by the ECtHR on the one hand allows discretion to the state that takes account of its diversity and on the other requires it to act as a guardian to safeguard the rights of individuals against state interference of Convention rights. MacDonald emphasises this delicate issue and asserts that the margin of appreciation requires 'good faith' and 'continuing cooperation' of contracting states⁶³³ and gives the flexibility required to balance the fragile relationship of state sovereignty and obligations under the Convention

The doctrine is well established but its use has lacked consistency, making it difficult to predict how it will be applied. This unpredictability makes matters difficult in evaluating precedents set by the court and individual certainty over the rights and freedoms guaranteed by the Convention. The doctrine has attracted considerable academic criticism, for example Fenwick is of the opinion that it is criticised because it may have undermined the growth of the Convention,⁶³⁴ and she refers to Van Dijk and Van Hoof who portray blunt disapproval of the use of the doctrine and have described it as 'a spreading disease. Not only has the scope of its application been broadened to the point where in principle none of the Convention rights or freedoms are excluded, but also the illness been intensified in that wider versions of the doctrine have been added to the original concept.'⁶³⁵

The first major case that used the margin of appreciation with some definitive principles being drawn under the limitation clauses contained in Articles 8-11 came in *Handyside v.*

⁶³¹ Article 13 ECHR

⁶³² For example the right to freedom of association in the former Eastern bloc countries and the rights of Jehovah's Witnesses in Greece

⁶³³ Ronald I Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 123

⁶³⁴ Helen Fenwick, *Civil Liberties and Human Rights* (3rd edn, Cavendish Publishing 2002) 39

⁶³⁵ Ibid 37 citing Pieter V Dijk and Fried V Hoof, *The Theory and Practice of the European Convention on Human Rights* (1st edn, Kluwer Law International 1990) 604

UK.⁶³⁶ The case involved an allegation by the UK that a book intended for school children was obscene and therefore the state was justified in banning it on the grounds that it was necessary in a democratic society. The complainant argued that the prohibition constituted a breach of his right to freedom of expression under Article 10. The notion of obscenity in the case raised the question of morals; a ground of justified interference under the Convention.⁶³⁷ The issue for the court was the sheer diversity of opinion in the member states as to what constitutes public morals? The court emphasised that states enjoyed a margin of appreciation in assessing whether a certain measure was 'necessary in a democratic society, in particular, whether there existed a pressing social need justifying the interference in the interests of public morals.' The court stressed:

It is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them... Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the 'necessity' in this context. Consequently, Art 10(2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator (prescribed by law) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.⁶³⁸

Although the court set an explicit foundation for a margin of appreciation, it made clear that the requirements of proportionality and a pressing social need had to be satisfied and that domestic practice was subject to supervision. In effect the court was asserting that the width

⁶³⁶ *Handyside v. UK* App no 5493/72, (7 December 1976)

⁶³⁷ Article 10(2) states: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

⁶³⁸ *Handyside v. United Kingdom*, supra (n 630) para 48

of the margin is not unlimited; the court in affording the state a margin of appreciation exercises a degree of restraint before making a decision on the compatibility of a domestic measure and balances it with the state's obligations under the Convention. This restraint is in effect an acknowledgement of the court's subsidiary role in the protection of human rights and also recognises the right of a democratic state to choose the content and the level of protection that is suited to the particular democratic society. This deference also needs to be measured carefully by the court; otherwise it could be seen as evading its supervisory responsibility as claimed in the veiling cases discussed in the next two chapters. This responsibility was made clear in *Handyside* where the court emphasised that Art 10(2):

Does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements... is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.⁶³⁹

Factors determining the width of the margin of appreciation

The matrix of factors that come into play in determining the width is complex⁶⁴⁰ and difficult to specify mechanistically. Schokkenbroek in his general report to the Directorate of Human Rights of the Council of Europe describes the width of the doctrine as variable and identified factors that would influence the width of the margin of appreciation as: the existence or non-existence of a common ground in the law of the member states, the nature of the aim pursued by the measure and its policy context, the nature of the applicant's activity and interests protected by the right including the seriousness of the interference and emergency situations.⁶⁴¹ The court in *Buckley v. UK* also confirmed the variety of factors that can be taken into account as 'the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.'⁶⁴²

⁶³⁹ *Handyside v. UK*, supra (n 630) para 49

⁶⁴⁰ Janvier Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War era' 54 *International and Comparative Law Quarterly* 459

⁶⁴¹ Jeroen Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30

⁶⁴² *Buckley v. United Kingdom* App no 20348/92, (25 September 1996) para 74

These factors are not invariable and have increased, for example a trend by the court has been to exercise judicial restraint if the higher courts of a state have analysed comprehensively the nature of the interference by the state authorities.⁶⁴³ Additionally, once the court has considered the breadth of the margin of appreciation only serious reasons could lead it to substitute its own assessment for that of the national authorities.⁶⁴⁴ This additional factor signals further uncertainties for new cases as there is a danger that any new cases involving the use of Islamic head dress are likely to lead to a greater chance of a wide margin of appreciation being afforded to state authorities, so long as the domestic court has analysed the case in hand in accordance with established European case law on the freedom to wear religious head dress. Alternatively it could be argued that this should lead to state authorities engaging better with the existing Convention jurisprudence and a more open discussion of the factors that play a part in determining the width of the margin of appreciation, ultimately resulting in a more balanced and transparent application of the principles being laid down by the European court. It is beyond the scope of this thesis to analyse the case law relating to all the different factors associated with the width of the margin of appreciation and thus the discussion will be limited to those factors that have played a prominent role in the decisions of the court relating to religious symbols and these are consensus and proportionality.

Consensus amongst signatory states

The different nature of the rights protected by the Convention and the diversity of individual interests means the protection of such interests may not be uniformly applied, due to the diversity of values and traditions amongst all forty seven signatory states to the Convention. The commonality of approach or consensus amongst states is a factor the court has consistently relied upon in interpreting the Convention to determine whether a wide or a narrow margin of appreciation should be afforded to a state. The reference to commonality amongst member states by the court reflects the need to maintain a delicate balance between the court and national legal systems, both progressing 'hand in hand'⁶⁴⁵ and consistent with the Convention system's respect for common heritage of political traditions and ideals to which the preamble to the convention affirms to. Benvenisti⁶⁴⁶ identifies legal consensus, expert consensus and European consensus as distinct factors relied upon by the Strasbourg organs in determining consensus for margin of appreciation purposes.

⁶⁴³ *Axel Springer AG v. Germany* [GC] App no 39954/08 (7 February 2012) para 88

⁶⁴⁴ *Mouvement Raillien Suisse v. Switzerland* [GC] App no 16354/060, (13 July 2012) para 66

⁶⁴⁵ *Handyside v. UK*, supra (n 630) paras 23 & 49

⁶⁴⁶ Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *International Law and Politics* 843

The use of consensus amongst the member states as a factor in determining the width of the margin of appreciation first surfaced in the judgement in *Handyside*⁶⁴⁷ where the court was satisfied that the interference was prescribed by law and was for a legitimate aim, namely the protection of morals but in assessing of the necessity of this interference in a democratic society, it stated that:

It is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The view taken by their respective laws of the requirement of morals varies from time to time and from place to place, especially in our era, which is characterised by a rapid and far-reaching evolution of opinions on the subject by reasons of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judges to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them ... Consequently, Article 10 para. 2 leave to the contracting states a margin of appreciation.⁶⁴⁸

The presence or absence of consensus is not an automatic guarantee of a narrow or a wide margin and it is this difficulty which resonates through the hijab and veiling Jurisprudence that is troubling, as it replaces certainty and precision with a lack of consistency in application of the margin doctrine.

The proportionality of state interference

The assessment of the proportionality of state measures interfering with an individual's Convention rights is also an important factor. It is described as the last stage of the court's decision making process.⁶⁴⁹ This means that having considered the availability of the margin of appreciation to the state authorities, the court finally proceeds to assess whether the measures employed by the state are proportional to the legitimate aim pursued. Hence the proportionality doctrine being described as 'the other side of the margin of appreciation,'⁶⁵⁰

⁶⁴⁷ *Handyside v. UK*, supra (n 630)

⁶⁴⁸ Ibid para 48

⁶⁴⁹ Andrew Legg, *Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 194

⁶⁵⁰ Arai-Takahashi, supra (n 617) 14

‘corrective and restrictive of the margin of appreciation’⁶⁵¹ and ‘probably the most important and perhaps even the decisive factor’⁶⁵² impacting the margin of appreciation. Although the importance of the impact of proportionality on the margin of appreciation is echoed by commentators, the explanation of the detail of that impact on the margin of appreciation is lacking in academic commentary.⁶⁵³

Proportionality like the margin of appreciation has no mention in the Convention and has no history in the drafting of the Convention.⁶⁵⁴ Klatt & Meister describe proportionality as a concept that is ‘by far the most important criterion for the analysis of fundamental rights’ and an element that is ‘both widely accepted and highly contested,’⁶⁵⁵ just as the court has remarked that ‘the search for balancing is inherent in the whole of the Convention.’⁶⁵⁶ The discourse on proportionality is surrounded by those who advocate it and those who are adherents of a ‘fair balancing’ approach. A full structural analysis of the proportionality doctrine or the near mathematical attributes associated with balancing is beyond the scope of this thesis as any analysis would require a thorough evaluation of the different human rights models such as the interest based theories, rights as trumps, priority to rights and the balancing theory.

The three essential requirements or the test of proportionality in International law as advocated by leading commentators are: suitability, necessity and fair balance.⁶⁵⁷ Suitability requires the interference against a right to be suitable for the purpose of achieving that aim and thus the state should ‘exclude the adoption of means which obstruct at least one right without promoting any other right or interest’.⁶⁵⁸ Necessity means that there must be no other suitable measure available that is less intrusive to the protected right, often described as the least onerous means of achieving the aim. The court suggests the adoption of this approach by using phrases such as ‘public policy should be pursued in the least onerous way as regards

⁶⁵¹ Macdonald, Matscher and Petzold, *supra* (n 633) 79

⁶⁵² Spielman, *supra* (n 628) 22

⁶⁵³ Legg, *supra* (n 649)

⁶⁵⁴ Brian Simpson, *Human Rights and the End of Empire - Britain and the Genesis of the European Convention* (Oxford University Press 2004) 73

⁶⁵⁵ Mathias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 1

⁶⁵⁶ *Sporrong and Lonnroth v. Sweden* Application no's 7151/75 7152/75, (23 September 1982); *Soering v. United Kingdom* App no 14038/88, (7 July 1989) para 89

⁶⁵⁷ Klatt and Meister, *supra* (n 655); Legg, *supra* (n 649); Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009)

⁶⁵⁸ Klatt and Meister, *supra* (n 655) 9

human rights’⁶⁵⁹ Fair balance refers to the principle of proportionality in the strict or narrow sense, in other words a suitable and a necessary measure employed by the state should not upset the fair balance or destroy the essence of the right.⁶⁶⁰ Under the European Convention the courts when referring to proportionality establish whether the least onerous means of achieving the legitimate aim has been used by the state and balancing conflict between rights has been considered by the court. This is evident from the court’s use of language such as the grounds for interference must be ‘convincingly established’⁶⁶¹ or be ‘convincing and compelling’.⁶⁶²

The use of the fair balancing test in proportionality analysis has led to the most controversy, as this would require balancing between Convention rights with the general interest of the community as suggested by the court,⁶⁶³ but without offering any explanation how this fair balance is to be achieved. Balancing rights against the collective community interest undermines the higher status human rights deserve if there is to be effective protection of liberties and individual interests. Collective interests of the community have a tendency to outweigh individual rights as apparent in the *S.A.S.* judgement discussed in chapter five where the rights of the French society outweighed those of Muslim women who veil. It should be the case of rights granting protection to individuals in order for them to realise their interests which are of central importance to them.⁶⁶⁴ This philosophy has been conceptualised by Dworkin’s rights as ‘trumps’ theory⁶⁶⁵ where individual rights trump utilitarian preferences and that rights cannot be overridden by simply calculating costs and benefits. Similarly, Habermas refers to rights as deontological ‘firewalls’ which act as an insulator from interference by reasons of welfare alone.⁶⁶⁶

The utilitarian approach to rights can be criticised since it leads to uncertainty in law, as one will never know the weight attached to various interests by the court. It is therefore conditional on circumstances and with a change in circumstances the weight accorded to

⁶⁵⁹ *Hatton and Others v. United Kingdom* App no 36022/97, (2 October 2001) para 97

⁶⁶⁰ Michael Fordham and De La Mare, *Identifying the Principles of Proportionality in Understanding Human Rights Principles* (Jowell and others eds, Hart Publishing 2001)

⁶⁶¹ *Weber v. Switzerland* App no 11034/84, (22 May 1990) para 47

⁶⁶² *Refah Partisi and Others v. Turkey [GC]* App no’s 41340/98, 41342/98, 41343/98, and 41344/98, (13 February 2003) para 135

⁶⁶³ *Gaskin v. United Kingdom* App no 10454/83, (7 July 1989) para 40; *Buckley v. United Kingdom* para 75

⁶⁶⁴ Marshall, *Human Rights Law and Personal Identity*, supra (n 198)

⁶⁶⁵ Dworkin, *Taking Rights Seriously*, supra (n 613) 192; Ronald Dworkin, ‘Rights as Trumps’ in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 153

⁶⁶⁶ Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1997) 258

interests would change, without any certainty of the past rule or how a future case is likely to be decided. Thus the possible permutations involved in balancing can be incomprehensible without any firm guidance or principles enumerated by the court as to precisely how balancing would be carried out. This aspect of balancing is the most controversial in legal commentary with some commentators who are of the opinion that it will involve 'delimiting a right into technical questions of weight and balance'⁶⁶⁷ and as Tsykirakis argues that with this approach the interests of the majority tend to outweigh the interests of the minority or individuals.⁶⁶⁸

Protection of religious freedom

There is a rich variety of interactions between law and religion and protection of religious freedom exists both in international law and national law in most jurisdictions.⁶⁶⁹ Religious interests are important to the individual concerned, of great significance to communities and hence the great utilitarian arguments for its respect.⁶⁷⁰ Adherents of the majority and minority religions need to feel protected by the state and perceptions of this close protection in the United Kingdom are reported by Bloomsbury and others who state that 'over the past decade there has, in general been a reduction in the reported experience of unfair treatment on the basis of religion or belief'.⁶⁷¹ But such positive perceptions are not confined to all groups as some Christian groups had reported that they were being marginalised as they felt other religions were getting a fairer treatment. Whilst non-religious groups were of the opinion that the special privilege religion gets results in unfairness to them.⁶⁷² A good example of this is when the Prime Minister of the UK David Cameron made a public statement that 'Britain is a Christian Country'⁶⁷³ leading to a public letter of protest from a number of academics and public figures including members of other and non-faith groups to the Telegraph newspaper.⁶⁷⁴

⁶⁶⁷ GCN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law and Jurisprudence 179

⁶⁶⁸ Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2010) 7 International Journal of Constitutional Law 468, 471

⁶⁶⁹ Greg Sisk, 'Stating the Obvious: Protecting Religion for Religion's Sake' (1998) 47 Drake Law Review 338

⁶⁷⁰ Peter W. Edge, *Religion and Law: An Introduction* (Ashgate Publishing Limited 2006) 7

⁶⁷¹ Paul Weller and others, *Religion or Belief, Discrimination and Equality* (Bloomsbury Academic 2013) 208

⁶⁷² Ibid 210

⁶⁷³ 'My Faith in the Church of England' *Church Times* (16 April 2014)

<<http://www.churchtimes.co.uk/articles/2014/17-april/comment/opinion/my-faith-in-the-church-of-england>> accessed 20 June 2014

⁶⁷⁴ 'David Cameron Fosters Division by Calling Britain a 'Christian Country': Most Britons are not Christians' *The Telegraph* (20 April 2014)
<<http://www.telegraph.co.uk/comment/letters/10777417/David-Cameron-fosters-division-by-calling-Britain-a-Christian-country.html>> accessed 20 June 2014

The significance for communities is further asserted by Adams who notes that religious interests being considered are a test of the rights culture prevalent in a particular society:

Religious liberty and the provision of fundamental human rights are ultimately inseparable...the international community will never ensure free association without permitting religious minorities to meet, free speech without allowing religious speech, non-discrimination and due process without granting religious minorities equal substantive and procedural rights under the law, democracy without allowing religious minorities to vote and run for office, indigenous rights without protecting indigenous religions, the rights of parents and children without protecting their right to sectarian education, and women's rights without ensuring their freedom to follow or reject religious teachings and customs.⁶⁷⁵

The importance of freedom of religion as a human right is evident by its inclusion in fundamental international human rights instruments⁶⁷⁶ and has also been made clear by the European Court of Human Rights in *Kokkinakis v. Greece*:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the convention. It is, in its religious dimension, one of the most vital elements which go to make up the identity of the believers and their conception of life, but it is also a precious asset to atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.⁶⁷⁷

⁶⁷⁵ Nathan Adams, 'A Human Rights Imperative: Extending Religious Liberty Beyond the Border' (2000) 33 Cornell International Law Journal 1, 64

⁶⁷⁶ Article 18 of the Universal Declaration on Human Rights of 1948; Article 18 of the International Covenant on Civil and Political Rights of 1966; Article 12 of the American Convention on Human Rights 1969; Article 8 of the African Charter on Human and Peoples' Rights 1981; Article 3 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981; Article 25 of the Arab charter on Human Rights 2004

⁶⁷⁷ *Kokkinakis v. Greece*, supra (n 604) para 31, the case was described by Judge Pettiti in his partly concurring judgement as the '...the first real case concerning freedom of religion to have come before the European Court since it was set up and it has come up for decision at a time when the United Nations and Unesco [were] preparing a World Year for Tolerance, which [was] to give further effect to the 1981 United Nations Declaration against all forms of intolerance, which was adopted after twenty years of negotiations'.

Despite the importance attached to freedom of religion by the ECtHR, the sheer amount of case law generated under Article 9 ECHR suggests that the right is not free from difficulties or state interference. There is a lack of consensus in the ECtHR jurisprudence and throughout Europe as to what the freedom under Article 9 entails,⁶⁷⁸ since there is no uniform conception of religion in society throughout Europe.⁶⁷⁹ This has resulted in the court allowing considerable deference to states to the detriment of those Muslim women who veil and bring actions under Article 9 which as a result of the lack of certainty are afforded far less protection than those who invoke the other freedoms under the convention.⁶⁸⁰ Any interference to religious freedom by the state is a result of the inevitable difficulties arising from living in a religiously pluralistic society, as highlighted by Knights:

Freedom of religion has always been one of the most controversial of rights at the international level. It is no less so in the domestic setting...the diversity of views on substantive beliefs, on the position of religion in the public sphere, and the balance between the right to express and manifest religious views on the other hand, and the legitimate restrictions that may be imposed by the state on the other, all create considerable challenges for society today.⁶⁸¹

She further argues that any agreement by states to the existence of the general principle of freedom of religion or belief, does not necessarily mean that the different states share an understanding of what is at stake, resulting in different outcomes when that broad principle of freedom of religion is applied to specific circumstances.

The operation of Article 9 ECHR

The right to freedom of religion is guaranteed by Article 9 of the European Convention on Human Rights which provides that:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

⁶⁷⁸ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 18

⁶⁷⁹ *Otto-Preminger-Institut v. Austria* App no 13470/87, (20 September 1994) paras 57-58

⁶⁸⁰ This difference will be elaborated further in the discussion of the ECtHR approach to Article 10 cases discussed in Chapter four

⁶⁸¹ Samantha Knights, *Freedom of Religion, Minorities, and the Law* (Oxford University Press 2007) 17

2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others.*

Article 9 differentiates between two aspects of religious freedom; the *forum internum* and the *forum externum*. The *forum internum* is the inviolable internal dimension of the right to freedom of thought, conscience and religion. This inner realm cannot be limited or coerced and confers on people the right to choose, change or adopt any belief or religion or belong to any religious group. The *forum internum* carries a corresponding negative freedom not to belong to any such group or have a belief or religion and to be free from compulsion of any religious confession. Thus states are under an obligation to refrain from interfering with citizens' inner convictions including ideological indoctrination, or other forms of manipulation and ensure others do not use improper means in interfering with this freedom. There is no all-encompassing definition for the *forum internum*, the standard recital used in case law is that 'Article 9 protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*'.⁶⁸² Where the *forum internum* protects one's inner convictions, the *forum externum* refers to the manifestations of belief and religion subject to state limitations, in effect creating a divide between an absolute freedom to believe and permissible limitations on actions based on beliefs held. However the distinction between the *forum internum* and the *forum externum* is not as clear cut with no judicial decision or scholar asserting a simplistic bright line between the two, nor any consensus between scholars as to the precise boundaries of the *forum internum*, other than the freedom to choose, change or maintain a religion and a corresponding freedom from coercion related to such choices. A believer can leave his faith or community,⁶⁸³ not be compelled to reveal religious conviction in order to avoid taking an oath in court proceedings,⁶⁸⁴ or to disclose religion in identity documents,⁶⁸⁵ or requiring elected politicians to be sworn in parliament by taking the oath on the Gospels.⁶⁸⁶

⁶⁸² Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 8; Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Martinus Nijhoff Publishers 2009) 124

⁶⁸³ *Darby v. Sweden* App no 11581/85, (23 October 1990)

⁶⁸⁴ *Dimitras and Others v. Greece* App no's 42837/06, 3269/07, 35793/07 and 6099/08, (3 June 2010)

⁶⁸⁵ *Sinan Isik v. Turkey* App no 21924/05, (2 February 2010)

⁶⁸⁶ *Buscarini and Others v. San Marino* App no 24645/94, (18 February 1999)

The only case, which discloses attempts to change beliefs by the state is *Riera Blume v. Spain*,⁶⁸⁷ in which the state interfered with the applicants' beliefs as they belonged to a sect and the authorities attempted to 'deprogramme' them, but the court dealt with the case in terms of deprivation of liberty under Article 5 and found it unnecessary to examine Article 9.⁶⁸⁸ The rationale behind the forum internum being inviolable has been clearly expressed by the ECtHR in *Kosteski v. The Former Yugoslav Republic of Macedonia*,⁶⁸⁹ where the applicant a Muslim had observed a religious holiday, which according to the state's constitution was a public holiday but he was penalised by his employer as he could not demonstrate his adherence to the Muslim faith 'the notion of the state sitting in judgement on the state of a citizen's inner personal beliefs is abhorrent and may smack unhappily of past infamous persecutions...'⁶⁹⁰

Although the ECtHR has not defined religion and 'exceptionally claimants have been required to prove the existence of the religion or belief in question, it is the definition of belief rather than religion that is often employed as a filter'.⁶⁹¹ In *Campbell and Cosans v. United Kingdom* the court has stated that opinions are not the same as beliefs and that it would accept a belief if it attains 'a certain level of cogency, seriousness, cohesion and importance' and for non-religious philosophical convictions, they must be worthy of 'respect in a democratic society... and are not incompatible with human dignity',⁶⁹² thus affording equal protection to non-religious beliefs under Article 9 providing the minimum criteria is satisfied.

The first part of Article 9(1) has not posed any real problems for the court and it has said relatively little about it. According to Evans 'it is only possible to discern its scope by examining what falls within the ambit of forum externum, perhaps better described as the sphere of external manifestation, to which considerable attention [by the court] has been paid'.⁶⁹³ The second part of Article 9(1) is referred to as the forum externum. The provision stipulates four ways religion and belief can be manifested outwards and these are: worship, teaching, practice and observance. It is this part of the provision that has posed challenges for the court. The

⁶⁸⁷ *Riera Blume and Others v. Spain* App no 37680/97, (14 October 1999)

⁶⁸⁸ *Ibid*, paras 31-35

⁶⁸⁹ *Kosteski v. The Former Yugoslav Republic of Macedonia* App no 55170/00, (13 April 2006)

⁶⁹⁰ *Ibid* para 39

⁶⁹¹ Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 83

⁶⁹² *Campbell and Cosans v. United Kingdom* App no's 7511/76, 7743/76, (25 February 1982) para 36

⁶⁹³ Evans, *Manual on the Wearing of Religious Symbols in Public Areas* 9

term 'manifest' suggests 'a perception on the part of adherents that a course of activity is in some manner prescribed or required'.⁶⁹⁴

The public manifestation of a religion or belief can be apparent by the activities of adherents of a religion or belief. For such actions to qualify as a manifestation it must be befitting of the categories of manifestation stipulated by Article 9(1) and it is this area that has raised some difficult challenges for the court. Evans raises one of the difficulties and questions that if an applicant was to engage in an action due to their religion or belief, is the court entitled to deny that the action is based on the facts presented to the court, or should the court accept the 'subjective characterisation' of the applicant's actions?⁶⁹⁵ The exact issue arose in *Valsamis v. Greece*⁶⁹⁶ where Jehovah's Witness parents disallowed their young daughter to take part in a school parade which would be preceded by military parades and official mass to commemorate an earlier war. This refusal led to the child being expelled from the school. Participation in the activities was objectionable to the child's parents who held pacifist views as Jehovah's witnesses. The expulsion of the child was challenged on the grounds that the parent's freedom of religion was denied. The court in rejecting the applicant's views stated that 'it can discern nothing, either in the purposes of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions...'⁶⁹⁷ and that 'the obligation to take part in the school parade was not such as to offend her parents' religious convictions.'⁶⁹⁸

The court adopted a similar reasoning in *Efstratiou v. Greece* where the facts were similar,⁶⁹⁹ however the approach taken by the court raised serious questions as it was trying to force its own opinion as whether an action amounts to an act that is of religious nature or not. This has led Evans to question the basis on which the court 'can determine that a person does not understand an issue to be of a religious in nature if they say that, for them, it is'.⁷⁰⁰ Similarly Martinez-Torron and Vavarro-Valls assert that the court had made a 'dangerous mistake. This could initiate an unacceptable itinerary leading to the court determining which beliefs are

⁶⁹⁴ Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (Council of Europe 2012) 21

⁶⁹⁵ Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, supra (n 682) 12

⁶⁹⁶ *Valsamis v. Greece* App no 21787/93, (18 December 1996)

⁶⁹⁷ Ibid para 31

⁶⁹⁸ *Valsamis v. Greece*, supra (n 696) para 37

⁶⁹⁹ *Efstratiou v. Greece* App no 24095/94, (18 December 1996)

⁷⁰⁰ Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, supra (n 682) 12

“reasonable” and which are not’.⁷⁰¹ The role of the court is to establish whether an applicant is relying on moral convictions they don’t hold to avoid a legal duty, but that doesn’t mean that the court can objectify the consistency of a person’s beliefs, since that would be a dangerous path as Harris and others argue that:

Whilst this approach... may have the advantage of excluding bogus or trivial beliefs from Article 9(1), it can also bring the court dangerously close to adjudicating on whether a particular practice is formally required by religion – a task which its judges, given the relevant theological issues, appear ill-equipped to handle.⁷⁰²

It appears that in *Valsamis* the court had deflected the fact that individual convictions must be respected and instead opted for an objective assessment, which is problematic because this could lead the court to inquisitions into the veracity of truths, rather than holding individual convictions as necessary to individual autonomy in Western societies. This is why the Convention system disallows any interference with that right unless it interferes with other individuals’ rights as will be seen during the discussion of Article 9(2). This upholds protection of freedom of religion as it allows European citizens to choose what they want to believe in.

However this does not mean that the ECtHR court does not have competence to engage in a fact finding inquiry. An example where a court may have to question an applicant’s ‘subjective characterisation’ as an act of manifestation is where the applicant is attempting to seek a benefit as in *Kosteski*⁷⁰³ and *X v. Austria*⁷⁰⁴ where a prisoner was seeking a certain benefit under the guise of religion. In this case the Commission disallowed an inmate access to prayer beads and to grow a beard on the grounds that it was not an ‘indispensable element in the proper exercise of the Buddhist religion’. The court justified the refusal on the grounds of health and discipline and difficulties in identification. Although on the facts the applicant would have been the only person in the prison to have a beard, of course that would not have prevented other inmates from alleging the same. The decision in these cases begs the question as to when is a manifestation attributed to that of a belief so both the forum internum and forum externum are triggered for an applicant to have protection of Article 9?

⁷⁰¹ Javier Martinez-Torran and Rafael Navarro-Valls, ‘Protection of Religious Freedom in the System of the Council of Europe’ in Tore Lindholm, W. Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 234

⁷⁰² David Harris and others, *Law of the European Convention on Human Rights* (Second edn, Oxford University Press 2009) 433

⁷⁰³ *Kosteski v. The Former Yugoslav Republic of Macedonia*, supra (n 689)

⁷⁰⁴ *X v. Austria* App no 1753/63, (15 February 1965)

What amounts to a manifestation of religion or belief?

The manifestation through '*worship, teaching, practice and observance*' amongst others affords protection to acts of worship, rites, rituals and attempting to convert others. The categories although only four are fairly broad and open to wide interpretation; the resultant case law generated has lacked consistency as to what amounts to a manifestation of a belief. According to the earlier ECtHR cases 'there was comparatively little debate surrounding the list of protected manifestations of religion or belief...Since then, however, the list has become a closed one and the use of religious symbols has been definitely identified as a form of *practice*'.⁷⁰⁵ The link between the forum internum and forum externum, holding a belief and manifesting that belief was considered by the Commission in *Arrowsmith v. UK*,⁷⁰⁶ a case involving a pacifist who distributed leaflets to soldiers discouraging them from serving in Northern Ireland. The Commission distinguished between a belief being held and a belief being communicated and acts motivated by that belief but not being central to the expression of that belief. Although pacifism had been acknowledged by the Commission as a belief, the distribution of the leaflets was not a manifestation for the purposes of Article 9 (2). Acts that are simply 'motivated or influenced by a belief' were held by the Commission to be excluded, suggesting that a very direct link is needed between the belief and the action if it is to amount to a 'practice' under Article 9.

The *Arrowsmith* test of a 'very direct link' often referred to as the 'necessity test' was considered and affirmed by the ECtHR,⁷⁰⁷ indicating that the necessity approach excludes behaviour that is merely encouraged or permitted by religion from the ambit of manifestation as opposed to behaviour that is actually required by religion. This test has been applied to a situation where an Islamic marriage between a man of 21 years of age and a girl of 14 years of age was held not to be required by Islam; rather it was simply permitted as one could marry a girl of 12 without her parent's consent under Islamic law. However the age of marriage in English law was 18 years of age in the absence of her parents' consent and therefore the Commission held that his criminal conviction for abduction disclosed no breach.⁷⁰⁸ Another case adopting similar reasoning related to the Moonies wanting to set up a legal association where the Commission held that the setting up of a legal association was not necessary for them to practice their religion.⁷⁰⁹ Though the test was an innovative device to control the open

⁷⁰⁵ Danial J. Hill and Daniel Whistler, *The Right to Wear Religious Symbols* (Palgrave Macmillan 2013) 21

⁷⁰⁶ *Arrowsmith Jenkins v. United Kingdom* App no 7050/75, (25 February 1982)

⁷⁰⁷ *Valsamis v. Greece*, supra (n 696)

⁷⁰⁸ *Khan v. United Kingdom* App no 11579/85, (7 July 1986)

⁷⁰⁹ *X v. Austria* App no 5442/72, (20 December 1974)

ended term 'practice', one of the high watermarks of the test was the application of it to other forms of manifestations as in *X v. UK*⁷¹⁰ where a Muslim teacher was refused time off on Fridays by his employer for him to attend mosque. The Commission decided the case on other grounds suggesting that no Article 9 issue was raised as the applicant had not shown it was a requirement that he attends Friday prayers.

The Commission has created inconsistency by deviating from the necessity test⁷¹¹ by asking whether the acts of the applicant 'give expression' to the belief or religion. Further inconsistency has been caused by the ECtHR by using a different test stating that Article 9 protects acts that are 'intimately linked' to personal convictions and beliefs.⁷¹² The necessity test is widely discussed in Article 9 literature⁷¹³ and criticised heavily⁷¹⁴ whilst others argue that the necessity test for manifestation is a myth⁷¹⁵ as it was never expressly stated in *Arrowsmith* and needs to be treated with caution.⁷¹⁶ The criticisms are valid as it would involve the court playing 'God' because it would be deciding whether an action was actually obligated or necessary for the belief or could their religion and belief have been manifested in a different way? Similarly Sandberg cites *Edge* to show that motivation of the applicant is important and the manifestation and motivation distinction has proved controversial:

Consider an individual with their hands clasped, reciting the Lord's Prayer aloud. This would seem to constitute an act religious in nature. Add the individual's Atheism, a camera crew, and a line in a film script 'Actor Prays' and it is no longer religious in nature. The distinctive feature is the presence or absence of religious motivation.⁷¹⁷

Therefore not surprisingly the retreat from the 'manifestation motivation' distinction and the adoption of the more favourable 'intimately linked' to the religion or belief of the applicant has

⁷¹⁰ *X v. United Kingdom* App no 8160/78, (12 March 1981)

⁷¹¹ *Knudsen v. Norway* App no 11045/84, (8 March 1985)

⁷¹² *Hasan and Chaush v. Bulgaria [GC]* App no 30985/96, (26 October 2000)

⁷¹³ Evans, *Freedom of Religion under the European Convention on Human Rights*, supra (n 678)

⁷¹⁴ Martinez-Torran and Navarro-Valls, supra (n 701); Peter Cumper, 'Freedom of Thought, Conscience and Belief' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press 1995); Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008)

⁷¹⁵ Hill and Whistler, supra (n 705) 44

⁷¹⁶ Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, supra (n 682) 211

⁷¹⁷ Sandberg, supra (n 691) 84

been more welcomed.⁷¹⁸ The burden is much lighter as the applicant need only evidence a form of causation between his or her actions and religion or belief,⁷¹⁹ a position also welcomed by The Equalities and Human Rights Commission.⁷²⁰

The specific situation rule

The specific situation rule referred to as the 'free to leave' rule by Harris and others⁷²¹ or 'interference attributed to the state'.⁷²² This is not a universal test as such but has been used as a filter by the ECtHR covering situations where the applicant has put themselves in a specific situation and potentially losing the protection as opposed to the state being responsible. For example in *Stedman v. UK*⁷²³ where a Christian applicant who refused to work on Sundays had resigned from her job and brought an action under Article 9 which the ECtHR rejected on the grounds that she had the choice of resigning from her post if she disagreed with working Sundays. Similarly in *X v. UK*⁷²⁴ a Muslim teacher who wanted an extended lunch on Fridays so he could attend congregational prayers at a nearby mosque. His Article 9 application was rejected as the court said that he remained free to resign if and when he found that his teaching obligations interfered with his religious duties.⁷²⁵ This approach has been widely applied to areas other than employment. For example those who voluntarily join the armed forces,⁷²⁶ get detained by the authorities on the ground they breached their contract with society,⁷²⁷ or voluntarily commenced university education.⁷²⁸ Similarly a more stricter approach based on 'impossibility' of manifesting a religion or belief before an Article 9 claim can succeed was evident in *Ch'are Shalom Ve Tsedek v. France*,⁷²⁹ where the court upheld a refusal to issue a licence allowing ritual slaughter to an Orthodox Jewish association because it could obtain 'glatt' meat from other sources, Belgium in this case. The court stated:

⁷¹⁸ Knights, supra (n 681) 44

⁷¹⁹ Sandberg, supra (n 691) 84

⁷²⁰ Equality and Human Rights Commission, *Human Rights Review 2012: How Fair is Britain? An Assessment of How Well Public Authorities Protect Human Rights* (UK Equality and Human Rights Commission, 2012) 325

⁷²¹ Harris and others, supra (n 702) 434

⁷²² Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, supra (n 682) 14

⁷²³ *Stedman v. United Kingdom* App no 29107/95, (9 April 1997)

⁷²⁴ *X v. United Kingdom* App no 8160/78, (12 March 1981)

⁷²⁵ Ibid

⁷²⁶ *Kalac v. Turkey* App no 20704/92, (1 July 1997)

⁷²⁷ *X v. United Kingdom* App no 5442/72, (20 December 1974)

⁷²⁸ *Karaduman v. Turkey [Com Dec]* App no 16278/90, (3 May 1993)

⁷²⁹ *Ch'are Shalom Ve Tsedek v. France [GC]* App no 27417/95, (27 June 2000)

A refusal of approval was capable of affecting the practice of their religion by Jews only if it was impossible for them, on account of that refusal, to find meat compatible with the religious prescriptions they wished to follow.⁷³⁰

The specific situation rule has been criticised as being highly limiting and detrimental to the sphere of employment as it would limit application of Article 9 to such areas⁷³¹ and the ECtHR has been criticised for being 'slow in giving acknowledgement to the complete range of manifestations of religion or belief that have been long recognised at United Nations level...'⁷³²

Although the judicial organs would require evidence of a link between acts and beliefs there has been a dramatic turn on the reliance of the 'belief and manifestation' filter and the use of the 'specific situation rule'. This dramatic shift does have its roots in the veiling cases, although it is not contended that such cases were specifically identified by the court or for any ulterior motive. Such a shift in approach by the ECtHR can only be welcomed. In the case of *Dahlab v. Switzerland*,⁷³³ a case concerning a prohibition against wearing the hijab by a teacher in a primary school coming before the ECtHR,⁷³⁴ the court did not engage in any discussion about the belief and manifestation filters, thus totally omitting a discussion on the forum internum or forum externum of Article 9(1) and proceeded straight to weighing up the states interests against the applicant's. Furthermore, as this was a classic employment case, where invoking the 'specific situation' rule would have been apt, the court did not even mention it, the result was that the court's attention remained on the justification of interference with the claimant's Article 9 rights.

Initially this approach may have been considered as confined to a particular case, but the affirmation of such a wholesale change came about in the landmark case of *Sahin v. Turkey* which was the first hijab case decided by the Grand Chamber. In the initial chamber judgement on the issue of the belief and manifestation filters, the court reiterates the *Arrowsmith* principle that 'Article 9 does not protect every act motivated or inspired by a religion or belief

⁷³⁰ Ibid para 64

⁷³¹ Vickers, supra (n 714) 116

⁷³² Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, supra (n 682) 234

⁷³³ *Dahlab v. Switzerland*, supra (n 27)

⁷³⁴ This was the first case decided on the merits, although a previous case *Karaduman v. Turkey* concerning prohibition of hijab for a photo on a degree certificate was held by the Commission to be manifestly ill founded

and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief'.⁷³⁵ Yet the court then proceeds and makes a startling statement:

The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.⁷³⁶

The chamber after reminding itself of the principle in *Arrowsmith* that not every act motivated or inspired by a religion or belief is guaranteed by Article 9 simply concludes that the applicant's decision to wear the hijab may be regarded as motivated or inspired by a religion or belief. The same principle that led to the court rejecting the applicant's case in *Arrowsmith* was now being accepted without any assessment or a fact finding exercise by the court in order to reach a conclusion on the belief filter. The court here simply bypasses those earlier requirements and assumes the existence of interference. The chamber judgement was approved and the above paragraph from the judgement was endorsed by the Grand Chamber without any discussion of the principles surrounding Article 9(1) with the court simply assuming there was interference. The Grand Chamber here lost an opportune moment to unify the previous approaches to the belief and manifestation filters discussed. Had a discussion taken place the court could have laid down a universal test as to what amounts to a manifestation of a belief? Instead, a conclusion that can be drawn is that the court wanted to repudiate the *Arrowsmith* test and commence a change of approach allowing actions that are motivated by a religion or belief to be classed as manifestations.

An alternate explanation is that the court simply wanted to move away from a focus on Article 9(1) which had proven to be a highly contentious approach and concentrate on Article 9(2). The effect would be that the ECtHR simply accepts practices which are merely motivated by belief or religion as manifestations. This would overcome criticisms of the court indulging in theological inquiries which the court itself has warned against *Manoussakis and Others v.*

⁷³⁵ *Leyla Sahin v. Turkey* App no 44774/98, (29 June 2004) para 66

⁷³⁶ *Ibid* para 71

Greece 'The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'.⁷³⁷ This is something which Lady Hale a Supreme Court Justice in the UK reminded the Irish Law Society in an annual lecture on freedom of religion and belief:

If the law is going to protect freedom of religion and belief it has to accept that all religions and beliefs and none are equal. It cannot realistically inquire into the validity or importance of those beliefs, or particular manifestation of them, so long as they are genuinely held.⁷³⁸

The trend of leaving behind the principle in *Arrowsmith* was further followed in *Dogru v. France* another hijab case⁷³⁹ and in *Jakobski v. Poland*, where the applicant demanded a vegetarian diet in accordance with his Buddhist beliefs which he was denied and upon avoiding non-vegetarian meals he was punished for going on a hunger strike. The ECtHR held his decision to maintain a vegetarian diet was motivated or inspired by his religion and the denial by the prison authorities was a breach of his Article 9 rights. The court affirmed the passage in *Sahin* adding a gloss to the effect that so long as the action was motivated or inspired by religion, it was not unreasonable:

Without deciding whether such decisions are taken in every case to fulfil a religious duty... as there may be situations where they are taken for reasons other than religious ones, in the present case the Court considers that the applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable. Consequently, the refusal of the prison authorities to provide him with a vegetarian diet falls within the scope of Article 9 of the Convention.⁷⁴⁰

⁷³⁷ *Manoussakis and Others v. Greece* App no 18748/91, (26 September 1996) para 47; *Hasan and Chaush v. Bulgaria [GC]* para 78; *Eweida and Others v. United Kingdom* App no's 48420/10, 59842/10, 51671/10, 36516/10, (15 January 2013) para 81

⁷³⁸ Lady Brenda Hale, 'Freedom of Religion and Belief' Human Rights Lecture for the Law Society of Ireland <<http://supremecourt.uk/docs/speech-140613.pdf>> accessed 9 July 2014

⁷³⁹ *Dogru v. France* App no 27058/05, (4 December 2008) para 47

⁷⁴⁰ *Jakobski v. Poland* App no 18429/06, (7 December 2010) para 45

But the approach of allowing motivations inspired by religion by the above case law has been thrown into further disarray by the ECtHR in *Eweida and Others v. UK*,⁷⁴¹ a case concerning the restriction on wearing of a Christian cross by employees. On the issue of whether the wearing of the cross was a manifestation the court affirmed this:

It was not disputed in the proceedings before the domestic tribunals and this Court that Ms Eweida's insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith. Applying the principles set out above, the Court considers that Ms Eweida's behaviour was a manifestation of her religious belief, in the form of worship, practice and observance, and as such attracted the protection of Article 9.⁷⁴²

But this does not resonate with another part of the court's judgement where it is clearly restating the complexities caused by *Arrowsmith* and rather than clarify or universalise the principles, it simply restates the permutations and the pre-*Sahin* position:

Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1... In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.⁷⁴³

⁷⁴¹ *Eweida and Others v. United Kingdom*, supra (n 737)

⁷⁴² Ibid para 89

⁷⁴³ Ibid para 82

In this reversal, the court once again opens up opportunities for academic criticism on the motivation manifestation link. However the ECtHR does repudiate the ‘specific situation’ rule which in some of the previous employment cases had proven detrimental to an Article 9 claim:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.⁷⁴⁴

Suggestions of adding the factor of ‘could the employee have resigned and moved employer’ to the proportionality assessment does not make matters easier for the court or for the applicant, as the proportionality assessment itself is riddled with inconsistencies and difficulties. However, the court has indicated an approach which should be welcomed. Whether that would be followed by later judgements concerning Article 9 cases would be the acid test. But the Grand Chamber in *S.A.S. v. France* the most recent case concerning the ban on full face coverings the Court simply reiterated the *Arrowsmith* approach.⁷⁴⁵ The Grand Chamber in this case appears to be re-stating the original *Arrowsmith* principle but then fails to engage in any discussion on the link between the applicant’s religion and manifestation of it, without expressly stating so and simply proceeds with interference and state justification issues. Once again as in *Sahin* the Grand Chamber failed to capitalise on an opportunity to add clarity to the law or clearly re-instate or repudiate the *Arrowsmith* equation leaving inconsistencies and omissions with its own jurisprudence.

Article 9(2) the limiting clause

Once an applicant has shown that the nature of the right asserted falls within the scope of Article 9(1), the applicant will have to show there has been an interference with that right by the state. Interference can take many forms dependent upon which one of four manifestations are asserted. For example it can take place if the state fails to discharge its positive obligations to protect Article 9 rights. Article 1 of the ECHR states that ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this

⁷⁴⁴ *Eweida and Others v. United Kingdom*, supra (n 737) para 83

⁷⁴⁵ *S.A.S. v. France [GC]*, supra (n 29) para 125

Convention'. Thus imposing a positive obligation on a state to protect religious rights and this could be achieved by affording religious rights protection in law and the availability of sanctions if infringed, ensuring prevention or a remedy in the event of a breach by state authorities. An example of this would be to prevent religiously motivated attacks on adherents of minority religions. Similarly the state also has negative obligations towards protection of religious rights and this is reflected in the wording of Article 9(2) 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as...' that imposes an obligation on a state to refrain from interfering with peoples rights', thus requiring the state to refrain from interfering with religious and non-religious beliefs of organisations and individuals. Article 9(2) limits the rights contained in Article 9(1) and allows states to interfere with religious rights only if it can show that the interference is prescribed by law and is necessary in a democratic society for one or more of the following interests: public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others. from these the 'rights of others' is the only category that has been invoked in cases involving the hijab and the veil.

Prescribed by law

This has been described as a 'rule of law' criterion developed by the Strasbourg case law, whereas the content of the 'democratic necessity' test is regarded as 'highly fluid and indeterminate.'⁷⁴⁶ The first criterion the state has to satisfy if it has interfered with an Art 9 right is that the measure that has allegedly interfered with that right is prescribed by law. This ensures that any interference by a state has a legal basis for it and is not arbitrary. This legal basis can be satisfied by statutory laws, case law or rules enacted by executive and administrative bodies, hence covering primary and secondary laws in member states.⁷⁴⁷ Case law has identified two essential elements to be met before it can be classed as law for the purpose of this standard: national law allowing interference must be accessible to the citizen and must be formulated in a way to be foreseeable or clear.⁷⁴⁸ Access to the law does not raise any conceptual issues and the *Sunday Times* case held that that it means the citizen 'must be able to have an indication that is adequate in the circumstances of the legal rules applicable to

⁷⁴⁶ Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe 1997) 7

⁷⁴⁷ Some administrative bodies have authority delegated by general laws to make rules that have the force of law for the purpose of the Convention; *Barthold v. Germany* App no 8734/79, (25 March 1985)

⁷⁴⁸ *The Sunday Times v. United Kingdom (No.1)* App no 6538/74, (26 April 1979) para 46

a given case.⁷⁴⁹ However, foreseeability does require a more rigorous assessment by the court, which has expanded on the requirement:

Foreseeability' is one of the requirements inherent in the phrase 'prescribed by law' in Art 10(2) ...of the Convention. A norm cannot be regarded as 'law' unless it is formulated with a sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...⁷⁵⁰

The level of precision required is relative and dependent on three factors: the content of the provision, the field it was designed to cover and the number and status of those to whom it is addressed.⁷⁵¹ Thus the words prescribed by law 'not only require the impugned measure should have some basis in law, but also refer to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects'.⁷⁵²

Legitimate aims

The second part of the limitation clauses contain the legitimate aims in a democratic society for which restrictions on the particular right can be justified by the state. For example, Article 9(2) contains the following aims: public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. It is claimed that this standard on its own rarely leads to a violation as, 'no democratically accountable state wishes to be accused of expressly at or impliedly incorporating arbitrary purposes into its legislation.'⁷⁵³ These aims will be confined to individual facts of a case and assertions made by a state. In terms of veiling cases, other than protection of health or morals, all the other interests have been asserted by states in case law pertaining to religious clothing discussed in later chapters.

Necessary in a democratic society

This standard in the context of an Article 9 complaint is the most controversial. The right in question and the context is an important factor in the application of this standard, however some interpretations are common to all the limitation clauses contained the limited rights

⁷⁴⁹ Ibid para 49

⁷⁵⁰ *Muller and Others v. Switzerland* App no 10737/84, (24 May 1988) para 29

⁷⁵¹ *Kalac v. Turkey*, supra (n 726); *Piroglu and Karakaya v. Turkey* App no 36370/02, 37581/02, (18 March 2008)

⁷⁵² *Leyla Sahin v. Turkey*, supra (n 735) para 74

⁷⁵³ *Arai-Takahashi*, supra (n 617) 11

afforded by Articles 8-11. Before commencing with the analysis of the assessment of this standard in an Article 9 context, it is important to highlight the distinction that has been drawn between the terms 'necessary and 'in a democratic society.' The court in *Handyside* stated:

Whilst the adjective 'necessary', within the meaning of Article 10 para 2, is not synonymous with 'indispensable', the words 'absolutely necessary' and 'strictly necessary' and...neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.⁷⁵⁴

The distinction drawn by the court is important as it means that any interference by the state must be justified by a 'pressing social need' associated with one or more of the legitimate aims being pursued by the state.⁷⁵⁵ When the court is determining if such a pressing social need exists, it will assess the prevalent circumstances at the time of the alleged interference as the state's interference and. The court in *Handyside* when discussing the term 'necessary in a democratic society' then went on to say that the reasons put forward by the state as justification for the interference must be both relevant and sufficient.⁷⁵⁶ This means that the method used by the state that interferes with a right must be 'proportionate' to the legitimate aim being pursued and when the state evaluates whether a pressing social need exists; it is allowed a margin of appreciation.

The interpretation of the term 'necessary in a democratic society' exemplifies the tension between individual rights and protection of the wider public interests of the state involved in an action under the Convention. The court will deploy the principle of proportionality when assessing the rights of the individual and the wider interest of society as a whole. Thus the application of the necessity test cannot be absolute as it requires a complex set of factual matrices to be applied by the court when assessing interference,⁷⁵⁷ but the text of the Convention does not contain this complex matrix; they have been introduced by the court.⁷⁵⁸ The Commission has indicated the factors involved when weighing up the requirement of necessity:

⁷⁵⁴ *Handyside v. United Kingdom* para, supra (n 630) 48

⁷⁵⁵ *Observer and Guardian v. United Kingdom* App no 13585/88, (26 November 1991) Para 59

⁷⁵⁶ *Handyside v. United Kingdom* para, supra (n 630) 50

⁷⁵⁷ Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, supra (n 682) 20

⁷⁵⁸ *Dijk and Hoof*, supra (n 635) 80

The necessity test cannot be applied in absolute terms, but requires the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and degree to which it requires protection in the circumstances of the case.⁷⁵⁹

Thus the determinative principles for the necessity in a democratic society are the margin of appreciation and the principle of proportionality and it is the inconsistent application of these two that has led to the problematic justifications being provided by the ECtHR in upholding prohibitions of the hijab and the veil.

The Strasbourg organs have attempted to identify some of the key components of a democratic society. For example, cases concerning Article 10 have led the court and the commission to describe freedom of expression as an 'essential foundation' of a democratic society requiring a narrow interpretation of the limitation clauses. The court made some specific references when referring to the *Handyside* case. In *Young, James and Webster v. UK*⁷⁶⁰ a case concerning closed shop union agreements the court said 'pluralism, tolerance and broadmindedness are hallmarks of a democratic society... Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.⁷⁶¹ This dictum is particularly important as it echoes with the philosophy of protecting the rights of the individual as opposed to the utilitarian approach to human rights protection, which has been evident in cases relating to the hijab and the veil. In respect of Article 9 the court in *Kokkinakis* was particularly emphatic about the features of a democratic society:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the convention. It is, in its religious dimension, one of the most vital elements which go to make up the identity of the believers and their conception of life, but it is also a precious asset to atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable

⁷⁵⁹ *X and Church of Scientology v. Sweden* App no 7805/77, (5 May 1979) para 5

⁷⁶⁰ *Young, James and Webster v. United Kingdom* App no's 7601/76 7806/77, (13 August 1981)

⁷⁶¹ *Ibid* 63

from a democratic society, which has been dearly won over the centuries, depends on it.⁷⁶²

Further elaboration or guidance has not been forthcoming from the European court's jurisprudence and this has led to particularly challenging issues faced by the court with respect to religious symbols, as much of the European population is now religiously pluralistic, yet the restriction on the use of religious symbols based on the majority society's opinion as in *S.A.S. v. France* appears to be necessary in a democratic society at the expense of an individual's religious freedom.

Conclusion

The protection of religious freedom under Article 9 ECHR attempts to balance the religious rights of an individual with the needs of the state to limit those in specified circumstances. Admittedly it is not easy to strike such a balance, but considering the ECtHR has accepted that religious belief is 'one of the most vital elements that goes to make up the identity of believers and their conception of life', the court appears to have struggled in giving effect to this principle, a sharp increase in cases since the first *Kokkinakis*⁷⁶³ judgement is evident of that. The lack of quality in the reasoning has led to such an increase, an obvious example being the court wrestling with what amounts to a manifestation? This has been further compounded by the court's own substitutions instead of the conscience of the applicant as in *Valsamis*⁷⁶⁴, which although a troubling suggestion, means that the court has been keen on demonstrating that it understands beliefs better than the adherent. It appears that the court is unclear of its role when dealing with religious freedom cases. This tendency of the court appears to have persisted in its judgements throughout the veiling cases as will be seen in the next two chapters. Effective protection of religious freedom with respect to veiling requires the court to interpret Article 9(2) limitations narrowly, particularly the necessity of a prohibitory measure in a democratic society. This requires an objective assessment of the factors involved and what appears to be lacking is the court's indication as to what are the essential ingredients of a democratic society? In the absence of such an indication, the balancing exercise between the rights of others and the rights of veiled women can lead to tilting in favour of the state. This can only be avoided if the court does not allow religious rights to be overridden in the absence of strong countervailing objectives, unless there is no other alternative. Whether the court has

⁷⁶² *Kokkinakis v. Greece*, supra (n 604) para 31

⁷⁶³ Ibid

⁷⁶⁴ *Valsamis v. Greece*, supra (n 696)

based its reasoning on strong evidence and lack of alternatives will transpire in the next two chapters covering the three key cases in relation to the hijab and the full face veil.

CHAPTER 4 - THE HIJAB AND ARTICLE 9 JURISPRUDENCE

Introduction

In the previous chapter the framework of the ECHR with Article 9 that guarantees protection of religious freedom was examined, with identification and application of the key principles and case law of the Convention to claims of interference with religious rights. This chapter addresses the specific application of Article 9 to the two key cases concerning the hijab; *Dahlab v. Switzerland*⁷⁶⁵ and *Sahin v. Turkey*.⁷⁶⁶ Although there have been a number of cases related to the hijab which the ECtHR has dealt with, the *Dahlab* case was one of the first cases that received real consideration by the ECtHR whilst *Sahin* was the first case concerning the hijab adjudicated by the Grand Chamber. Factually the cases are distinguishable as *Dahlab* related to a teacher at a primary school whereas *Sahin* concerned a student at a university. This chapter critiques the ECtHR jurisprudence on the issue of Islamic religious symbols and questions the failure by the court to give effect to the applicants' Article 9 rights. The chapter considers the factual differences between the two cases with specific legal articulation by the court for both judgements followed by an analysis of the court's legal reasoning. The chapter then offers specific arguments that highlight the failure by the court, in giving full consideration to the issues at stake and the adoption of negative stereotypes associated with the hijab, coupled with the ECtHR failure to listen to the applicants' voices.

*Karaduman v. Turkey*⁷⁶⁷ was the very first case concerning the hijab that came before the European Commission. In this case the dispute was between the applicant and Turkey where a student was refused a photograph on her university diploma with her wearing a headscarf, as the university regulations required uncovered hair on the applicant's photograph. The claimant alleged a breach of Article 9 ECHR. The Commission rejected her claim on the grounds that there had been no interference with her Article 9 rights and stated that:

By choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to

⁷⁶⁵ *Dahlab v. Switzerland*, supra (n 27)

⁷⁶⁶ *Leyla Sahin v. Turkey*, supra (n 735) chamber judgement; *Leyla Sahin v. Turkey [GC]*, supra (n 28) Grand Chamber judgement

⁷⁶⁷ *Karaduman v. Turkey [Com Dec]*, supra (n 728)

ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion. Where secular universities have laid down dress regulations for students, they may ensure that certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others.⁷⁶⁸

Thus in the first case that considered the hijab, the Commission did not even acknowledge that there was an interference with the applicant's Article 9 rights. Although there have been a number of other cases involving the issue of hijab that have come before the ECtHR,⁷⁶⁹ analysis in this thesis will be limited to three of the most important cases on the hijab and full face veiling, as they contain the important jurisprudence on the application of the ECHR to religious clothing, these being *Dahlab v. Switzerland*⁷⁷⁰, *Sahin v. Turkey*⁷⁷¹ and *S.A.S. v. France*.⁷⁷²

Dahlab v. Switzerland

The *Dahlab v. Switzerland*⁷⁷³ case was the second after *Karaduman v. Turkey*⁷⁷⁴ to be decided on the Islamic headscarf, raising issues of religious freedom before ECtHR to be adjudicated on admissibility. The applicant was a primary-school teacher in Geneva who having abandoned the Catholic faith, converted to Islam in March 1991 and began wearing an Islamic headscarf in class, she had not attracting any complaints to the authorities or any adverse comments from parents on the subject. The applicant had been forbidden to wear the hijab by the authorities on the grounds that it contravened section 6 of the Public Education Act as it was a visible means of imposing her religious identity on her pupils, especially in a public secular education system. The applicant lost her appeal to the local authorities and a further appeal to the Federal court, which examined the issue of whether the hijab was indeed a religious symbol, and if so, whether it was a core aspect of freedom of religion. It concluded that the issue in

⁷⁶⁸ Ibid

⁷⁶⁹ *El Morsli v. France* App no 15585/06, (4 March 2008); *Aktas v. France* App no 43563/08, (30 June 2009); *Bayrak v. France* App no 14308/08, (17 July 2009); *Gamaleddyn v. France* App no 18527/08, (17 July 2009); *Ghazal v. France* App no 29134/08, (17 July 2009); *Ahmet Arslan and Others v. Turkey* App no 4135/98, (23 February 2010); *Dogru v. France*; *Kervanci v. France* App no 31645/04, (4 December 2008)

⁷⁷⁰ *Dahlab v. Switzerland*, supra (n 27)

⁷⁷¹ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁷⁷² *Dahlab v. Switzerland*, supra (n 27); *Leyla Sahin v. Turkey [GC]* ibid; *S.A.S. v. France [GC]*, supra (n 29)

⁷⁷³ *Dahlab v. Switzerland* ibid

⁷⁷⁴ *Karaduman v. Turkey [Com Dec]*, supra (n 728)

question was the wearing of a powerful religious symbol in the performance of the applicant's professional duties whilst teaching and thus the wearing of the headscarf was an outward manifestation which is not an inviolable core of religious freedom.⁷⁷⁵

In accordance with the established Convention principles, for any limitations to be justified under Article 9, the state had to show that the interference with the applicant's wearing of the hijab was prescribed by law and was for a legitimate aim that was necessary in a democratic society. The court in determining whether the interference was justified in a given set of circumstances must interpret the freedom of religion and belief under Article 9(1) in its widest sense, whilst any limitations to such a fundamental right must be construed narrowly. Thus a distinction is drawn between a violation of freedom of religion and belief and a limitation on it, so it is not a question of whether prohibitions on the hijab in this case limits religious freedom but whether the state imposed limitations are justifiable. Having considered the limitations, the court must then proceed to an assessment of the margin of appreciation that could be granted to the state, having balanced the individual's rights at stake and the state interests. Finally the court must carry out a proportionality analysis of the measures used by the state to ensure it was the least restrictive means of achieving the stated legitimate aims.

The ECtHR found that the legal basis for the restriction does not have to be precise since civil servants were bound by a voluntary special relationship of subordination to public authorities.⁷⁷⁶ The court stressed that by the displaying of powerful religious symbols, the applicant may have interfered with religious beliefs of her pupils and parents and that the lack of complaints does not mean they were not affected, as some may have decided to avoid any direct action or aggravation of the situation.⁷⁷⁷ The court held that their decision was in accordance with the principle of denominational neutrality in schools to ensure religious harmony and that if teachers were allowed to manifest their religious beliefs using clothing, then schools would become places of religious conflict where the public interest demands the restrictions to avoid such conflicts in schools. The court's reasoning set the scene for schools to be places free from religion as followed by France, where Muslim girls in Public schools are prohibited from wearing headscarves.

⁷⁷⁵ *Dahlab v. Switzerland*, supra (n 27) at pg 3

⁷⁷⁶ Ibid pg 3

⁷⁷⁷ Ibid pg 4

The applicant argued that the purpose behind the wearing of the hijab was as an ordinary item of clothing that could be widely purchased and used for aesthetic reasons and as such, the prohibition amounts to a restriction on the way teachers would wish to dress. On this point the Federal Court said:

There is no doubt that the appellant wears the headscarf and loose-fitting clothes not for aesthetic reasons but in order to obey a religious precept which she derives from the following passages of the Koran...The wearing of a headscarf and loose-fitting clothes consequently indicates allegiance to a particular faith and a desire to behave in accordance with the precepts laid down by that faith. Such garments may even be said to constitute a 'powerful' religious symbol – that is to say, a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion...⁷⁷⁸

To the Federal court, the Islamic headscarf amounted to a 'powerful symbol' that was represented by a state employee and it was the symbol that was in issue and not regular clothes, or even outlandish clothes with no religious connotations. On the issue of balancing the interests of the applicant's religious interests, in the sense of obeying a religious precept against the denominational neutrality of the educational system, the Federal court reminded that 'religious freedom cannot automatically absolve a person of his or her civic duties – or, as in this case, of the duties attaching to his or her post... Teachers must tolerate proportionate restrictions on their freedom of religion.'⁷⁷⁹

The Federal court acknowledged that the hijab forces a difficult choice between an important Islamic precept and her job and that her pupils are of an impressionable age even though she is not accused of proselytising or even discussing her beliefs with her pupils. However, she could not avoid questions by her pupils about the headscarf without referring to her beliefs. The court also noted that allowing headscarves in classrooms would result in acceptance of garments that are powerful symbols of other faiths such as soutanes and kippas, emphasising that as a matter of proportionality, the government allowed teachers to wear discreet religious symbols such as small pieces of jewellery. The Federal court reminded that you cannot prohibit crucifixes in the classrooms but allow powerful religious symbols of whatever denomination.⁷⁸⁰

⁷⁷⁸ *Dahlab v. Switzerland*, supra (n 27) pg 2

⁷⁷⁹ Ibid pg 5

⁷⁸⁰ Ibid pg 6-7

The ECtHR agreed with the Federal court that the interference pursued the legitimate aim of protecting the rights of others, public safety and public order. The court noted in its reasoning that although the impact of a powerful external symbol such as the hijab is difficult to assess, the children were very young and easily influenced and in such circumstances, thus the proselytising effect of the hijab worn by a teacher could not be ignored. This was particularly so since it appeared to be imposed by a precept of the Qur'an, which the Swiss federal court had considered hard to reconcile with the principle of gender equality. The court further found that the wearing of the hijab was difficult to reconcile with the message of tolerance, respect for others and the gender equality expected to be conveyed to pupils from teachers in a democratic society. Therefore the court having regard to the young age of the children and the preservation of religious harmony in the classroom outweighed the applicant's right to manifest her religion and held the interference was within the margin of appreciation deferred to the Swiss authorities.⁷⁸¹ The European court declared the application inadmissible as ill-founded without it going to a full hearing and only gave brief reasons without any real signs of supervisory jurisdiction being exercised, despite the fact that this was an important case on religious symbols coming before the court.

Leyla Sahin v. Turkey

In this case the applicant Leyla Sahin, a Turkish national from a traditional family of practising Muslims considered it her religious duty to wear the Islamic headscarf. At the material time she was a fifth-year student at the faculty of medicine of Istanbul University. On 23 February 1998 the Vice-Chancellor of the University issued a circular directing that students with beards and those wearing an Islamic headscarf would be refused admission to lectures, courses and tutorials. In March 1998 the applicant was refused access to a written examination on one of the subjects she was studying because she was wearing the Islamic headscarf. Subsequently the university authorities refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination. The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for a semester, for taking part in an unauthorised assembly that had gathered to protest against the dress restrictions. The applicant brought an action before the ECtHR alleging a breach of Articles 8, 9, 10 and 14 with Article 2 of Protocol No.1 of the ECHR.⁷⁸²

⁷⁸¹ *Dahlab v. Switzerland*, supra (n 27) pg 13

⁷⁸² The Articles cover the right to private life, religion, freedom of expression, non-discrimination and education respectively

ECtHR Chamber Judgement Sahin v. Turkey

The ECtHR chamber judgement⁷⁸³ proceeded noting that there were polarised views on hijab in schools and universities; those who favoured the wearing of it saw it as a duty and/or expression linked to religious identity, whereas those opposed to it saw it as a political symbol based on religious precepts that threaten civil unrest and undermine women's rights in Turkey. The court also noted the use of the hijab as a political symbol, a matter that was taken into consideration by the Turkish constitutional court when dissolving political parties in the past, even those who were in government. The court acknowledged the Turkish constitutional court's explanations that secularism had acquired constitutional status and for Turkey it was an essential condition for democracy, preventing the state from showing a preference for a religion or belief, and that once outside the private sphere of individual conscience, freedom to manifest one's religion could be restricted on public interest grounds in order to defend secularism. And although individuals were free to dress how they wanted, when a particular dress code was imposed on individuals by reference to a religion, the religion concerned was perceived and presented as a set of values that were incompatible with those of contemporary society. The court was of the opinion that in Turkey, a majority Muslim country, if the hijab was to be considered a mandatory religious requirement, then those who do not wear it would be perceived as irreligious. And since students were expected to pursue their education without religious distractions, granting legal recognition to hijab wearers in state education would defeat the principle of neutrality of state education, potentially leading to conflicts between students of differing convictions or beliefs.⁷⁸⁴

Issues arising under Article 9 ECHR

The applicant alleged that a prohibition on wearing a hijab in higher education institutions was an interference with her Article 9 rights, whilst the government denied a breach and argued that in any event the interference was justified. On the issue of interference the applicant's argument was that the hijab had to be treated as a religious rule which amounted to a recognised 'practice' under Article 9 and its restriction was a clear interference. The court proceeded on the basis that there was an interference with her Article 9 rights, simply bypassing the belief and manifestation tests. On whether the interference was prescribed by law and had legitimate aims, the court acknowledged the national court's decision and accepted the interference was prescribed by law and pursued the legitimate aims of protecting

⁷⁸³ *Leyla Sahin v. Turkey*, supra (n 735)

⁷⁸⁴ Ibid

the rights and freedoms of others and of protecting public order, a point which was not in issue between the parties.

It is surprising from a legal perspective that the court simply assumed the interference with manifestation of religion, thereby failing to realise an opportunity to clarify or formulate a test to be applied in later cases as to what amounts to an interference.⁷⁸⁵ On first appearance it may appear that this was an advertent demonstration of the underlying reluctance by judicial bodies to recognise values of key religious practices outside Christianity.⁷⁸⁶ However it can be argued that the ECtHR is an international court that takes account of international human rights standards, for example, when assessing whether there is European consensus on a matter under consideration, the court can look at international human rights instruments.⁷⁸⁷ And as religious symbols are accepted as manifestations of religion, it is possible the court alluded to the observations of the Human Rights Committee who have elaborated on Article 18 of the ICCPR which is analogous to Article 9 (1)⁷⁸⁸ 'The observance and practice of religion or belief may include not only ceremonial acts but also customs as...the wearing of distinctive clothing or head coverings...' ⁷⁸⁹ It is noteworthy how the court recognised the negative stereotyping effects of the hijab on those who do not wear the hijab, even though those who wear it or support it may see it as a positive expression of their faith and this was one of the essentialist viewpoints of those who support the hijab and see it as emancipatory as highlighted in part one of this thesis.

The major issue that arose in terms of whether the legitimate aims pursued by the state was the requirement of necessity in a democratic society, the most onerous hurdle for a state to pass in order to justify interference with Article 9 rights. The applicant asserted that her religious manifestations were extremely serious, as she was a practising Muslim and that she had not opposed or protested against the principle of secularism. And that the manner in which she complied with her religious beliefs was not intended as a form of protest to exert

⁷⁸⁵ Although it was a step in the right direction considering the court in *Karaduman v. Turkey* did not even deem the restriction on wearing a headscarf on photographs on degree certificates an interference with Article 9

⁷⁸⁶ Evans, *Freedom of Religion under the European Convention on Human Rights*, supra (n 678)

⁷⁸⁷ *Marcx v. Belgium* App no 6833/74, (13 June 1979)

⁷⁸⁸ Article 18(1) International Covenant on Civil and Political Rights states 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

⁷⁸⁹ General Comment No.22: The Rights to Freedom of Thought, Conscience and Religion (Art.18) 30 July 1993, CCPR/C/21/Rev.1/Add.4, General Comment No.22

pressure, provoke or proselytise.⁷⁹⁰ Furthermore during her studies at the university the state could not show that her wearing a hijab had caused any disruption, disorder or a threat to the university and that no university would allow her to pursue her higher education if she wore the hijab.⁷⁹¹ She also affirmed that the majority of Turkish people committed to secularism were opposed to theocracy but not the hijab. And as the hijab did not question republican values or the rights of others, it was therefore not incompatible with secularism and neutrality of state education, as reflected in the practice of various European states.⁷⁹² The applicant further contended that if there was a risk of tensions between opposing groups, which was inevitable in a pluralistic society, the authorities in such cases should 'not eliminate the cause of the tensions by doing away with pluralism, but to ensure that the competing groups were tolerant of each other'.⁷⁹³

The government contended there were factors peculiar to Turkey which meant that the principle of secularism on which the Turkish Constitution rested had assumed particular importance compared to other democracies and protecting the secular state 'was an essential pre-requisite to the application of the Convention in Turkey'.⁷⁹⁴ The government argued that the domestic courts and the situation in Turkey demonstrated that the hijab was a symbol used by religious extremists for political purposes and threatened the rights of women. And any legal recognition of the hijab in public institutions would be tantamount to religious privilege, giving rise to plurality of legal status of individuals. The government further argued that principles of Sharia were incompatible with secularism as well as with the Convention and higher education authorities were justified in prohibiting access to those men with beards and women wearing hijab. This restriction according to the state was imposed as a preventative measure after the receipt of complaints from other students of pressure from students belonging to fundamentalist groups. Furthermore there had already been one confrontation between opposing radical groups and regulation of religious symbols preserved the higher education institutions' neutrality.⁷⁹⁵ Clearly the government considered the hijab incompatible with Turkish secularism, which had acquired constitutional status and asserted that just because the regulations prohibiting the practice were not applied rigorously, did not mean that the rules were not justified.

⁷⁹⁰ *Leyla Sahin v. Turkey*, supra (n 735) para 85

⁷⁹¹ Ibid para 86

⁷⁹² *Leyla Sahin v. Turkey*, supra (n 735) para 87

⁷⁹³ Ibid para 88

⁷⁹⁴ *Leyla Sahin v. Turkey*, supra (n 735) para 91

⁷⁹⁵ Ibid para 96

The ECtHR then cited *Kokkinakis v. Greece*, re-affirming that in democratic societies where there is religious pluralism, it may be necessary to restrict Article 9 rights in order to reconcile interests of other groups to ensure everyone's beliefs are respected.⁷⁹⁶ Thus affirming its decision in *Karaduman v. Turkey* and *Dahlab v. Switzerland* without any real discussion as to why the wearing of the Islamic headscarf was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety?⁷⁹⁷ Or how Turkish secularism was in harmony with the rule of law and respect for human rights?⁷⁹⁸ Instead the court proceeded to justify the local factors in play, elaborating that where the majority population was Muslim, measures taken by universities to prevent fundamentalist groups exerting pressure on non-practising Muslim students and those of other faiths to ensure peaceful co-existence of various faiths and to protect public order and beliefs of others was justified.⁷⁹⁹ The court based this view on account of complementary principles of secularism and equality and as secularism protects individuals from external coercion, the right to manifest one's religion could be restricted in order to protect these values and principles. The court further noted that Turkish secularism is consistent with Convention values and accepts that 'upholding that principle [of secularism] may be regarded as necessary for the protection of the democratic system in Turkey'.⁸⁰⁰

The court emphasised the achievement of gender equality, a key Convention value by member states. In respect of the hijab, the court highlighted that in the Turkish context it can have an impact on those who choose not to wear it, the issues at stake being the rights of others and public order requirements. Thus its prohibition could be regarded as meeting a 'pressing social need', especially since it had political connotations since there were 'extremist political movements in Turkey which seek to impose on society as a whole, their religious symbols and conception of a society founded on religious precepts'.⁸⁰¹ The ECtHR chamber unanimously concluded that having regard in particular to the margin of appreciation left to Contracting States, the university regulations prohibiting head scarves and the measures implementing them were justified, proportionate and necessary in a democratic society. The court also found no separate questions arose under Articles 8, 10 ECHR and article 2 of Protocol 1 and simply

⁷⁹⁶ *Kokkinakis v. Greece*, supra (n 604) para 33

⁷⁹⁷ *Leyla Sahin v. Turkey*, supra (n 735) para 98

⁷⁹⁸ Ibid para 99

⁷⁹⁹ Ibid

⁸⁰⁰ Ibid para 106

⁸⁰¹ Ibid para 109

reached this verdict on alleged breaches of these rights without any discussion of the principles. The applicant requested the case to be referred to the Grand Chamber under Article 43 ECHR which the Grand Chamber accepted with the case being heard on 18 May 2005.⁸⁰²

The Grand Chamber Judgement Sahin v. Turkey

The GC noted the diversity of approaches that existed amongst European states in regulating the hijab in educational establishments, just as the chamber had done and affirmed the Chamber's findings with respect to the existence of an interference, the interference being prescribed in law, and being in pursuance of legitimate aims, namely protecting the rights and freedoms of others and of protecting public order, the fundamental issue being the necessity of the prohibition in a democratic society.

The applicant in challenging the chamber's findings formulated an additional argument before the GC based on notions of democracy and republic being dissimilar in the way that totalitarian regimes may claim to be democracies, but that principles of pluralism and broadmindedness could only be found in true democracies. She argued that the framework of the judicial organs and the higher education systems in Turkey were products of successive military coups d'état. And in view of the ECtHR jurisprudence that had been adopted in a number of European countries, contracting states should not enjoy a wide margin of appreciation allowing restriction of students' dress. This was especially since no other European State prohibited the hijab at university and there had been no tensions reported warranting such draconian measures.⁸⁰³ She further explained that students in higher education had capacity and capability, to make their own decisions about appropriate behaviour and the allegations by the government that she demonstrated lack of respect for other students' convictions by wearing hijab were unfounded. Furthermore her choice to wear the hijab was based on religious conviction, the most important fundamental right that pluralistic liberal democracy had granted her. Therefore she claimed it was not fair to allege that simply wearing the hijab contravened gender equality as 'all religions imposed such restrictions on dress which people were free to choose whether to comply with them or not'.⁸⁰⁴

The GC emphasised the ECHR jurisprudence on Article 9 acknowledging the importance of religious rights,⁸⁰⁵ reiterating that where several religions coexist in democratic societies, at

⁸⁰² *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁸⁰³ Ibid para 100

⁸⁰⁴ Ibid para 101

⁸⁰⁵ Ibid para 104

times restrictions on manifestation of religion or belief may be necessary for the reconciliation and respect of all beliefs.⁸⁰⁶ The GC moved onto emphasise the importance of maintaining neutrality by the state in matters associated with religious beliefs placing emphasis on the margin of appreciation left to contracting states:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance... This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially (as the comparative-law materials illustrate... in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... and the meaning or impact of the public expression of a religious belief will differ according to time and context ... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order... Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context'.⁸⁰⁷

On allowing a wide margin to Turkey, the GC asserted that it must have regard to the need to 'protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society.'⁸⁰⁸ The GC also took opportunity to affirm the two hijab cases of *Karaduman v. Turkey* and *Dahlab v. Switzerland* justifying restrictions on wearing the headscarf in order to protect the rights of others, public order and public safety. As for the case on hand, the GC simply cites the part of the judgement from the chamber and affirms it along with the Turkish Constitutional Court's findings and proceeded to discuss the requirements of proportionality, without any discussion of the principles and merely cites the cursory:

⁸⁰⁶ Ibid para 106

⁸⁰⁷ Ibid para 109

⁸⁰⁸ Ibid para 110

By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course... Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose' and that Article 9 does not always guarantee the right to behave in a manner governed by a religious belief... and does not confer on people who do so the right to disregard rules that have proved to be justified.⁸⁰⁹

The court held that the Turkish authorities had the benefit of a wide margin of appreciation in this sphere and that the interference in issue was not only justified in principle but was proportionate to the aim pursued, therefore there was no violation of Article 9. It further held that there had been no breaches of Article 8, 10 or 14, the only dissent coming from Françoise Tulkens of Belgium, one of the female judge's in the Grand Chamber.

Analysis of *Dahlab* and *Sahin*

Although both cases concerned the restriction on wearing the hijab by Muslim women in educational establishments, there is a factual distinction in that one applicant was a teacher in primary school and the other a student in higher education. The reasoning of the ECtHR displays commonality of approach in both cases, thus the analysis has been undertaken on that basis, but drawing on differences as required. The ECtHR reasoning in both cases is founded on: the hijab as powerful external symbol; the difficulty of reconciling the hijab with gender equality; and the incompatibility of the Hijab with a tolerant, secular society and respect for rights of others. Thus the analysis will focus on these constituent elements of the judgements followed by the application of the margin of appreciation and proportionality analysis.

The hijab as a powerful external symbol

In *Dahlab* the court expressed that the wearing of hijab had the potential of a proselytising effect on primary school pupils by referring to it as 'a powerful religious symbol'. It has to be acknowledged that a school teacher has a lot of influence over young children being in a position of power and such influences can have profound effects on how children make choices in their later years. A teacher is a role model to those children and as such

⁸⁰⁹ Ibid para 121

denominational neutrality as required of all state employees and plays a crucial role in moulding those choices. Therefore a distinction has to be drawn between diversity in society and the maintenance of state neutrality in the education system; one reason why the Swiss state did not allow Christian crosses in the classroom, ensuring the Swiss education system was free from state enabled indoctrination of beliefs or ideas that approve or disapprove morals against the will of the parents.⁸¹⁰

The aim of the state is to achieve a level playing field for religious freedom, individually or collectively. Hence the court stated in *Manoussakis & Others v. Greece* that under the ECHR the right to freedom of religion 'excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate'.⁸¹¹ One of the issues arising from the *Dahlab*⁸¹² reasoning has been that the state has positively attempted to erase religion from the public school, in the name of state neutrality. The state in this case did have a duty to maintain neutrality in its schools which means the state does not express any allegiance to particular beliefs and in prohibiting the applicant from wearing a symbol of religious affiliation since she was a representative of the state, it complied with that duty. In this respect the neutrality argument itself cannot be criticised but, the subsequent reasoning and attitudes adopted by the state and the ECtHR is not immune from challenges. At no point did the teacher encourage Islam, nor did she even inform the children that she wore the hijab for religious reasons. In her evidence she said that she told the children it was to keep her ears warm, which is an indication that she took positive steps to ensure that her headscarf did not propagate any proselytising effects, if there were any. The court failed to refer to any empirical data pointing to the harmful effects of the hijab on the children and any inferential evidence of proselytising was acknowledged by the court as very difficult to assess. On this very issue of the proselytising effects of hijab on young children, the German Constitutional court in the *Fereshta Ludin* case which was identical to *Dahlab*,⁸¹³ concerning a primary school teacher wearing a hijab, confirmed the lack of veracity of such an inference stating that 'there was insufficient empirical data to indicate any harmful influence of the hijab on children'.⁸¹⁴

⁸¹⁰ *Folgero and Others v. Norway* [GC] App no 15472/02, (29 June 2007)

⁸¹¹ *Manoussakis and Others v. Greece*, supra (n 737) para 47

⁸¹² *Dahlab v. Switzerland*, supra (n 27)

⁸¹³ *Ibid*; *Fereshta Ludin*, BVerfG, 2 BVR 1436/02 924 (September 2003)

⁸¹⁴ Cited in: Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 113

There was no evidence of any of the children converting to Islam or any complaints from the children or their parents during the four years of the applicant wearing the hijab. It is then questionable that on the one hand the court stated that the impact of the hijab is 'very difficult to assess' which if anything should act as attenuation of its proselytising effects and the fact that the court qualifies the effects by stating that there was the possibility of some kind as opposed to a direct claim of it. Yet on the other, the court still accepts the government's mere assertion that proselytising effects may exist, despite the lack of evidence adduced to that effect, a point that Ungureanu concurs with:

The conjecture that wearing the veil may negatively influence pupils cannot be taken for granted, especially when it is not backed by expert studies... it is reasonable to envisage that pupils be exposed in schools to a plurality of opinions and lifestyles.⁸¹⁵

Surprisingly the court made no reference to some of the Muslim children at the school who wore traditional Islamic clothing and any negative signals they may have sent to the other children, although the neutrality argument only applies to servants of the state and not the school children. Since the alleged proselytising effect of the hijab was one of the primary reasons behind the judgement, if the court had a sound basis it would have referred to *Kokkinakis v. Greece*⁸¹⁶ the leading case concerning proselytism under Article 9 ECHR. The case concerned a couple who were Jehovah's witnesses and went round knocking on the door of a house which was answered by the wife of a member of the Greek Orthodox Church. The Jehovah's witnesses engaged in a dialogue with her in order to relay their faith trying to convert her, a practice which was a criminal offence at the time in Greece. The court in that case held that that convincing others of the truth of one's religion is a manifestation of religious freedom that is protected under Article 9 and that there was a difference between proper and improper proselytising. The former was where someone simply tries to convince others to change their religion and was not a breach of Article 9, whereas the latter form contained elements involving threats, monetary incentives or some form of control. Understandably the issue of proselytism has to take a different turn when the parties being influenced are vulnerable adults or more so in this case; young children.

⁸¹⁵ Camil Ungureanu, 'Europe and Religion: An Ambivalent Nexus' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012) 325

⁸¹⁶ *Kokkinakis v. Greece*, supra (n 604)

The paternalistic approach adopted by the authorities could be understood in this context since the state a neutral state has to be vigilant of such practices in a neutral environment involving children. However the applicant in *Dahlab* did not engage in any such activities, although there was the existence of a power relationship which was not abused. Neither did the court refer to the abuse of such a relationship utilised to proselytise those in vulnerable positions as in *Larissis v. Greece*⁸¹⁷ where an Air Force Officer used his senior military rank to exert repeated pressure on junior ranking airmen to change their beliefs, the court holding it a breach of Article 9 rights of the junior servicemen.

Instead the court in *Dahlab*⁸¹⁸ attempted to justify its reasoning by stating that ‘children wonder about many things’ suggesting that there was a possibility of the hijab having such an effect due to the ages of the young children involved. But on the curiosity trait inherit in children, if anything, there was the possibility that the young children might have questioned why their teacher had suddenly been removed from school. This could lead to possible formation of negative stereotypes associated with religion, or even re-inforce those that have already been formed in the minds of the children from exposure to rest of society. Evans notes that the messages sent to children are entirely contradictory as on the one hand the message is that women need to be protected from the oppressive practice of veiling, yet on the other, children need protection from the women who proselytise using their veils.⁸¹⁹ Allowing the adoption of such views could hardly be conducive to instilling in children, values such as respect and tolerance on religious matters. Diversity, plurality and the message of tolerance have to be given respect by all and children grow up in a such an environment will adopt such values, whether that is through play with others or observing different and changing identities amongst adults, but if they were removed from the early years setting in schools then arguably such values would only have meaning in the later years of life, by which time there is a danger that other people’s identities or diversity is categorised negatively.

The court’s weak arguments on proselytising effects of the headscarf in the absence of any convincing evidence or arguments by the state lead to the consequence that the threshold of the requirement ‘necessary in a democratic society’ was kept very low by the court. The

⁸¹⁷ *Larissis and Others v. Greece* App no's 23372/94 26377/94 26378/94, (24 February 1998)

⁸¹⁸ *Dahlab v. Switzerland*, supra (n 27)

⁸¹⁹ Carolyn Evans, ‘The Islamic Headscarf in the European Court of Human Rights’ (2006) 7 Melbourne Journal of International Law 52, 64

necessity of the measure is the distinguishing feature between a legitimate state interference and a violation of an Article 9 freedom. The burden of justifying the interference rests with the state, and a mere possibility of the hijab having a proselytising effect is not a convincing argument, considering a fundamental religious right was in issue for the applicant and especially since the limitations to rights need to be interpreted in narrow terms. The consequence of such a low threshold for the necessity requirement goes against the courts own jurisprudence where it has stated that the interference has to be ‘relevant and sufficient’⁸²⁰ and thus prevents the requirement acting as a check that ensures an individual’s rights are not interfered with by the state without a real justification. This approach by the court questions the court’s guardianship of religious freedom when it comes to religious symbols and the flawed reasoning of the court was effectively sanctioning double standards with respect to the hijab as a religious symbol and neutrality in the classroom. This is evident from the Federal Court’s assertion about proportionality of response with respect to religious symbols, whereby the Canton government allowed teachers to wear discreet religious symbols such as small jewellery; presumably small Christian crosses.

In *Sahin*⁸²¹ the ECtHR instead of providing its own reasoning on the effects of the hijab, if any, simply adopted the *Dahlab*⁸²² court’s reasoning and the assumption that it was a powerful external symbol and therefore had a proselytising effect on adult students in a higher education setting, justifying its prohibition under Article 9(2). But the court did not distinguish between the younger children in *Dahlab*⁸²³ who may have been more susceptible to the effects of external religious symbols and the higher education students who are maturing adults and have the ability to decide for themselves what meaning they wish to attribute to such symbols. The court in *Sahin*⁸²⁴ just as it followed *the Dahlab*⁸²⁵ reasoning, it also failed to consider the ECtHR own previous reasoning⁸²⁶ on ‘proper’ and ‘improper’ proselytism, where the former has been considered protected under article 9 and the latter unprotected. Judge Tulkens dissent captures the objections to such assumptions and the ease with which the ECtHR was convinced of the need for prohibition:

⁸²⁰ *Handyside v. United Kingdom*, supra (n 630) para 50

⁸²¹ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁸²² *Dahlab v. Switzerland*, supra (n 27)

⁸²³ *Ibid*

⁸²⁴ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁸²⁵ *Dahlab v. Switzerland*, supra (n 27)

⁸²⁶ As in *Kokkinakis v. Greece*, supra (n 604)

The possible effect which wearing the headscarf, which is presented as a symbol, may have on those who do not wear it does not appear to me, in the light of the Court's case-law, to satisfy the requirement of a pressing social need.⁸²⁷

The ECtHR appears to have relied in both headscarf cases on the notion of lack of compatibility of the hijab with the Convention's core values deferring a wide margin of appreciation to Switzerland and Turkey. Yet in *Lautsi v. Italy*⁸²⁸ a case concerning a Christian religious symbol, a different conclusion was reached. The case involved an action by a parent whose children attended Italian state school where the mother objected to the presence of large Christian crosses in the classroom on the grounds that she wanted her children brought up in a religiously neutral education environment. In this case even though the chamber judgement followed *Dahlab's*⁸²⁹ reasoning that the Crosses were a powerful external symbol that could have a proselytising effect on the children, the Grand Chamber reversed the decision.⁸³⁰ The hijab had been declared a powerful external symbol by the ECtHR, yet the Grand Chamber in *Lautsi*⁸³¹ concluded in what appeared to be inverted logic, that the crosses were a passive symbol. And on that basis, a wide margin of appreciation was afforded to the state on the grounds that the mandatory presence of the crosses in the classroom did not violate the parent's right to educate her children in accordance with her non-religious beliefs. This reasoning is not reconcilable since by the ECtHR own acknowledgement that the Italian domestic courts 'were divided over the legitimacy of the display of the crucifix' the Grand chamber still defers to the Catholic religion and the Italian state. Whilst in *Dahlab*⁸³² the position was the reverse, where the court deferred to neutrality in the classroom and refused to acknowledge the non- proselytising effects of the hijab.⁸³³ According to Mancini and Rosenfeld the *Lautsi*⁸³⁴ judgement defies all logic as it implies that representing Christ's suffering on the cross as less likely to have an impact on children than the wearing of a mere piece of cloth on a teacher's head.⁸³⁵

⁸²⁷ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 9

⁸²⁸ *Lautsi and Others v. Italy [GC]* App no 30814/06, (18 March 2011)

⁸²⁹ *Dahlab v. Switzerland*, supra (n 27)

⁸³⁰ It is worthy to note that Françoise Tulkens the dissenting Judge in *Sahin* was the President of the Chamber when it heard the *Lautsi* case but she did not adjudicate in the Grand Chamber

⁸³¹ *Lautsi and Others v. Italy [GC]*, supra (n 828)

⁸³² *Dahlab v. Switzerland*, supra (n 27)

⁸³³ Susanna Mancini and Michel Rosenfeld, 'Unveiling the Limits of Tolerance' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012) 180

⁸³⁴ *Lautsi and Others v. Italy [GC]*, supra (n 828)

⁸³⁵ Mancini and Rosenfeld, 'Unveiling the Limits of Tolerance', supra (n 833) 181

Difficulty of reconciling the hijab with gender equality

The court in both *Dahlab*⁸³⁶ and *Sahin*⁸³⁷ advanced the gender equality argument to justify their findings in favour of Switzerland and Turkey. The ECtHR has frequently emphasised that gender equality is a major objective for member states to achieve and the first case where the ECtHR affirmed the advancing nature of sexual equality was *Abdulaziz, Cabales and Balkandali v. UK*,⁸³⁸ a case concerning different immigration rules based on sex for spouses to join their partners in the UK. In *Sahin* the court said gender equality was a key principle of the Convention⁸³⁹ and used it as a justification for its decision. Considering the level of importance such an issue had on those who wear the hijab, neither court gave it the consideration that was expected. The courts did not explore what gender equality means, or how the behaviour of the applicants threatened the concept or indeed the way the principle could be justified against two independent women, who had adopted the hijab that was important to them personally. In the first part of the thesis it was shown that the imposition of dress codes on Muslim women could be the consequence of gender biased interpretations and that patriarchy was still prevalent amongst Muslim households in Europe. And that the imposition of dress codes such as the hijab or the veil were on women only with no such requirement imposed on men, although the Qur'an mandates the same level of modesty from men in terms of gaze aversion. The state and the court are mindful of gender discrimination against women and remedying inequalities is a key Convention objective, which means that where there is a clash of gender equality and religious or cultural rights the court would give prominence to eliminating inequalities against women, but this does require justifications and the reasons to be stated by the court.

The court in *Dahlab*⁸⁴⁰ did not explain or substantiate their broad claims as to why they found the headscarf hard to reconcile with gender equality and non-discrimination.⁸⁴¹ Instead it simply made a statement lacking cogency: 'appears to be imposed on women by a precept which is laid down in the Koran' and which, as the Federal Court noted, is 'hard to square with the principle of gender equality'.⁸⁴² The reasoning of the court suggests a construction of equality in a formal sense equating with sameness whereby Muslim women who wear the

⁸³⁶ *Dahlab v. Switzerland*, supra (n 27)

⁸³⁷ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁸³⁸ *Abdulaziz, Cabales and Balkandali v. United Kingdom* App no's 9214/80 9473/81 9474/81, (28 May 1985) para 78

⁸³⁹ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 115

⁸⁴⁰ *Dahlab v. Switzerland*, supra (n 27)

⁸⁴¹ Manisuli Ssenyonjo, 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work: A Survey of Recent International and National Cases' (2007) 6 Chinese Journal of International Law 653

⁸⁴² *Dahlab v. Switzerland*, supra (n 27) pg 13

hijab are perceived as lacking equality and being different. The discriminatory effects of the hijab are at odds with the outcome of the prohibition on the hijab since that in itself equates to gender discrimination resulting in denial of the freedom Muslim men would possess. The state and the court are attaching distorted meanings to a religious symbol and in doing so effectively silence the voice of women who adopt the hijab whilst proclaiming to save them. It appears that the court is using a broad –brush approach and including all women who wear the hijab as being objects of gender equality, without listening to the individualities of the applicant. If the court had done so it could have led to evidence emerging and pointing to a different conclusion, as well as acknowledgement that the meaning of veiling is loaded with multiplicities dependent on the individual woman who veils.

The court's approach signals an acceptance of the persisting negative stereotypes associated with women who wear the hijab or the veil; that those who choose such practices, do so because they are oppressed. Therefore ignoring those women who may have freely chosen to wear the hijab, which was made evident in part one of this thesis and the court by default implying that such women's choices cannot be authentic. This line of reasoning clearly ignores the possession of autonomy of Muslim women and rejects their agency and in effect gives incorrectly credence to the false consciousness argument. It is a concern that the ECtHR and the federal court overlooked or failed to understand that such a Qur'anic precept is for the maintenance of modesty applying equally to both sexes, although men are not required to wear the hijab, they still need to maintain their modesty and the hijab is not to oppress women. The ECtHR reasoning is further questionable when it avoids closer scrutiny on the grounds that it is not best placed to assess the necessity of the measure, yet it finds itself apt to criticize a mainstream religion. Although the court's decision in on the grounds of maintenance of neutrality is understandable, the objectivity of the court in reaching its conclusions is questionable, as will be demonstrated by an analysis of the choice of language used in the judgement.

The court's use of the term 'appears to be imposed'

The use of the term '*appears to be imposed*' in *Dahlab*⁸⁴³ is suggestive of negative connotations, in the sense that there is a doubt on such a prescription which has a basis in the Qur'an, which would be questioning whether it is a manifestation of a belief, an issue the court had avoided a discussion on. The fact that the court proceeded to discuss Article 9 (2) means

⁸⁴³ Ibid

the assumption was already made, something which was directly affirmed in *Sahin*.⁸⁴⁴ The use of such a phrase is surprising, considering most religions impose requirements on their followers of one form or another, so why would it be an issue if it was a Qur'anic imposition? The impositions can come from culture, family, or indeed the state itself as in Saudi Arabia, Iran and Afghanistan. More importantly the Qur'an simply offers a way of life which Muslims can choose in accordance with an important Qur'anic injunction that there is no compulsion in religion. The phrase used by the court has subordinate connotations, suggesting the women in question had no choice but to comply with the imposition. Considering in both cases the women were adults who were both educated and autonomous, there is no reason to suggest that the wearing of the hijab was due to an imposition, rather it was a voluntary act which both applicants freely decided to engage in thus there is no cause to question their choice.

The hijab as a 'precept' of Qur'an

The Federal court used the term '*precept*'⁸⁴⁵ in a fleeting manner which should not have been used without discussion of the influences different interpretations of Islamic texts can have and lead to different contextual meanings associated with the hijab. Indeed some radical interpretations of the Qur'an can lead to unjust treatment that is gender biased and as discussed in previous chapters there is a body of literature and a drive by some Muslim feminists who aim to eliminate gender inequalities with re-reading of the Islamic texts from a woman's perspective. It is inappropriate for the court to use such a term in the absence of the associated discussion of its relevance, particularly in the absence of any evidence of a forced imposition of the hijab on the applicant. Such disparaging comments by a national court should have been meted with disapproval by the ECtHR rather than acceptance, and has rightly attracted academic criticism:

The role of the court is not to 'put on trial' books like Koran – the milestone of a hugely complex and changing religious tradition of practice and interpretation...it is also noteworthy that the ECtHR has double standards: the court has never passed such sweeping negative verdicts over the Bible, even if one can easily find statements that are at loggerheads with the contemporary understanding of democracy and gender equality.⁸⁴⁶

⁸⁴⁴ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁸⁴⁵ *Dahlab v. Switzerland*, supra (n 27) pg 2

⁸⁴⁶ Ungureanu, supra (n 815) 324

The ECtHR was wrong in endorsing the Federal court's views on imposition of Qur'anic precepts and instead of condemnation of such disparaging comments, since they had no relevance to the legal reasoning and neither was it a matter for the ECtHR to consider as that would be outside the court's competency, it tacitly approved them. The court's generalized approach to this issue indicates that it is more at comfort to attributing negative stereotypes which deem Muslim women who veil as oppressed and in need of saving, irrespective of the assertions by both applicants that they wore the hijab through their own free will. And despite the applicants' arguments that it was the state that was imposing rules on how they were to dress, the court still proceeds on the reasoning that rules of religious clothing were imposed on the applicants by the Qur'an. The court clearly does not acknowledge the different motivations and contexts associated with those who wear religious dress which is a consequence of the failure to listen to the voices of women who engage in that practice.

The hijab being 'difficult to reconcile' with gender equality

The use of the phrase '*difficult to reconcile*'⁸⁴⁷ raises similar issues. The court having made such a strong statement to the effect that Muslim women who wear the hijab are subjugated irrespective of the facts before them; both women were educated, professional and strong willed who protested against restrictions on hijab, raised gender inequality arguments against the authorities and were able to litigate in order to realize their rights. Judge Tulkens' dissent questions such a paternalistic approach taken by the European court:

It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. 'Paternalism' of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.⁸⁴⁸

⁸⁴⁷ *Dahlab v. Switzerland*, supra (n 27) pg 13; *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 111

⁸⁴⁸ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulken's dissenting judgement para 12

This type of paternalism does not resonate well with Howard either who states that 'Banning headscarves and other religious symbols is just as paternalistic and oppressive of women as forcing them to wear these'.⁸⁴⁹ Indeed there are cases where the state needs to adopt a paternalistic approach in order to further gender equality. This may be where there is evidence that there could be pressure on children or that there may be other choices available to an applicant that don't depart from the basic tenets of their beliefs as in the UK case of *Shabina Begum*.⁸⁵⁰ The issue in the case was of a young girl in secondary school who wished to wear a jilbab (an Islamic cloak) instead of a prescribed school uniform chosen after consultation with the faith communities. The uniform chosen by the school was Salwar Kameez which was agreed by both the school and the parents. The then House of Lords dismissed her appeal under Article 9 on the ground that if the applicant was allowed to wear a Jubba it would exert unjust pressure on the other girls against their wishes to wear the same. Although Poulter argues the distinction between what amounts to a debate between parents and children as to what constitutes religious clothing and what amounts to patriarchal impositions of clothing is a very fine one.⁸⁵¹

It is a concern that in both cases concerning the hijab, the ECtHR appeared to be endorsing the stereotypical viewpoint that Muslim women who veil are oppressed and those who say they do so through choice, are victims of false consciousness. In this case the adoption of such restrictive viewpoints by the court highlights that women at the centre of wearing religious attire, are not only unheard by the religious and feminist discourses discussed in part one of the thesis, but by the courts too, who should be listening to and protecting the rights of Muslim women when they come before them to claim their human rights. It is unfortunate that the interpretation of gender equality in both cases failed to consider the individual applicant's perspective of wearing the hijab and could deprive them of education and employment which would promote the gender equality of Muslim women rather than erode it. The court failed to realise that for some Muslim women, the hijab offers a means of accessing public spaces and to education, through which Muslim women can make the advances in life, renegotiating the gender imbalances, which may exist and at the same time enable other younger women in a household further opportunities of the public space. By

⁸⁴⁹ Erica Howard, 'Islamic Veil Bans: The Gender Equality Argument' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 214

⁸⁵⁰ *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15

⁸⁵¹ Sebastian Poulter, 'Muslim Headscarves in Schools: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 71, 72

prohibiting the use of the hijab in public institutions the women are being confined to practicing certain aspects of their faith in the private, with the same if not more gender inequality. Furthermore the hardship that may be caused to those who are coerced into wearing the hijab by family or the community can only be compounded as such legal pronouncements could only further endorse such practices and deprive them of educational and employment aspirations. The consequence of the court's failure to consider the perspective of the woman at the centre of the debate is that the principle of gender equality was directly pitched against personal autonomy and as such, the court went against its own jurisprudence on the right to personal autonomy.

According to Marshall the court in *Sahin* failed to offer an adequate analysis of such a pitting of these issues and should have involved 'upholding a form of equality that acknowledges difference,' the re-enforcement of 'women's sense of their own identity' through the promotion of individual choice. This choice includes what they wish to wear and if veiling practices are going to be declared oppressive, that should be furnished with evidence and evaluation of the social impact prohibition of veiling would have on them.⁸⁵² Similarly Radacic, in tune with Marshall's assertions, argues that 'The ruling displays a lack of sensitivity to difference, including cultural and religious identity...'⁸⁵³ She notes that, had the court 'conceptualized equality as challenging disadvantage' and applied an 'ethics of care approach' then the court could have 'found a way to reconcile the principle of gender equality with the right to personal autonomy'. And that the disadvantage approach would mean that forcing and prohibiting veiling would both constitute a breach of the Convention, the focus being on the equality of treatment rather than the results.⁸⁵⁴

The identification of gender equality as a reason to prohibit the wearing of the hijab by the ECtHR in both cases simply imposed an abstract reasoning that the hijab is a symbol of gender inequality imposed on women only, irrespective of their free choice and therefore oppressive. There does however, exist a body of feminist discourse that supports this view⁸⁵⁵ but conversely there is discourse that declares the wearing of hijab is a method of achieving gender equality in public space, and is certainly not perceived as subjugation by those Muslim

⁸⁵² Jill Marshall, 'Freedom of Religious Expression and Gender Equality: *Sahin v Turkey*' (2006) 69 *Modern Law Review* 452, 459

⁸⁵³ Ivana Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19 *The European Journal of International Law* 841, 853

⁸⁵⁴ *Ibid*, 856

⁸⁵⁵ Gies Lieve, 'What Not To Wear: Islamic Dress And School Uniforms' (2006) 14 *Feminist Legal Studies* 377, 384

women who decide to wear it on their own will.⁸⁵⁶ There is no doubt that there may be some Muslim women who may be coerced into wearing such religious attire and thus laws prohibiting such practices may have the effect of protecting their dignity and equal rights, whilst preserving secular values. But there is a lack of empirical evidence to this effect, due to the difficulty of accessing such women and the effect of religiosity of the researcher that can distort the responses.⁸⁵⁷ The adoption of a stance by the court without any empirical evidence can lead to an inference that it is because the hijab was perceived as a threat from a specific religion and not because the woman at the centre was the focus of protection. The court simply used the label 'gender inequality' without engagement into the meaning of the term and how it applied to the applicant, and in any event, it was contrary to the applicant's assertion of Article 14 ECHR that the prohibition on hijab against her itself was discriminatory to her as a woman.

In *Dahlab*, the applicant raised the argument that the restriction of the hijab was discriminatory against her as a male Muslim teacher can teach in state school without any restrictions, whilst a Muslim woman manifesting her beliefs could not. But the court avoided a direct response to her and instead, forwarded a comparator with someone of a different religion and on the issue of gender discrimination by the applicant, the *Dahlab* court in dismissing the Article 14 claim stated:

The applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.⁸⁵⁸

Although the court had already dealt with the issue of the same prohibition that would apply to religious symbols of other faiths, it would have been interesting to see how the court would have dealt with a male teacher of the Sikh faith with a turban and whether that would have

⁸⁵⁶ Bullock, *supra* (n 25); Marshall, 'Freedom of Religious Expression and Gender Equality: *Sahin v Turkey*', *supra* (n 852); Erica Howard, 'Banning Islamic Veils – Is Gender Equality a Valid Argument?' (2012) 12 *International Journal of Discrimination and the Law* 147

⁸⁵⁷ Lisa Blaydes and Rachel M. Gillum, 'Religiosity-of-Interviewer Effects: Assessing the Impact of Veiled Enumerators on Survey Response in Egypt' (2013) 6 *Politics and Religion* 459

⁸⁵⁸ *Dahlab v. Switzerland*, *supra* (n 27) pg 14

been termed a 'powerful external symbol', begging the question if Sikh men who wear turbans can ever become primary school teachers in Switzerland? It is also possible that the applicant could be the subject of gender discrimination if a Muslim male school teacher who wore a beard on the grounds that it was an Islamic mandate in Islam, which some Muslim men believe to be the case, was allowed to teach. In such a case a distinction would have to be made between religious clothing as symbols and other forms of symbolism such as beards or if an orthodox Jewish female teacher wore a wig which the children could clearly identify as such? Such questions warranted exploration by the court due to a strong claim by the applicant but were evaded by the court.

Indeed the discourse that perceives the hijab as a sign of male domination brackets all Muslim women as homogenous without exploring contextual and situational meanings of the hijab. It also fails to address the question why all Muslim women do not wear the hijab? The hijab does not have a static meaning and a good example of some of the permutations that can exist is implicit in McGoldrick's statement:

The empirical evidence is that different members and generations within the same family can take different views on the headscarf-hijab. A grandmother might wear it, a mother not. One daughter then follows the grandmother, the other the mother. A wife might wear it even though her husband would prefer that she did not. In an immigration context, the first generation may seek to be invisible so as to gain acceptance, while the second and subsequent generations seek to be visible so as to gain recognition. If each individual seems to make their own free and informed decision then a very strong interest would be needed to override their views.⁸⁵⁹

It is contended that this 'very strong interest' overriding the applicant's case, particularly in *Sahin*⁸⁶⁰ was absent, and assertions that the applicants and other Muslim women do wear the hijab through their own free will was not considered by the ECtHR. Furthermore, it was not the court's role to make judgements about gender inequality in the absence of any empirical evidence and the dissenting judgement of Judge Tulkens is explicit in the misappropriation of the court's role in this respect. Although it is questionable whether the state can ever have a

⁸⁵⁹ Dominic McGoldrick, 'Extreme Religious Dress; Perspectives on Veiling Controversies' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2010) 425

⁸⁶⁰ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

positive obligation to prohibit headscarves in the private sphere under Article 9 or any other provision in the absence of some identifiable harm:

It is not the Court's role to make an appraisal of this type — in this instance a unilateral and negative one - of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant... Finally, if wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private.⁸⁶¹

The wearing of the hijab does not signal an absence of choice and there are many other positive reasons for wearing it despite the politicization of the religious symbol⁸⁶² from a Muslim woman's perspective, as shown in the previous chapters of the thesis. Although the position of teachers in schools is different as they have a choice, but for a student faced with a higher education establishment prohibits the hijab or leaving and not being able to pursue higher education has major ramifications for Muslim women's options when it comes to making choices, thereby attenuating their freedom. Restrictions on the hijab can drive young girls to remain at home in effect depriving them of a right to education or the placing of them in religious schools which tend to be segregated by gender and therefore can actually propagate gender inequality, instead of eliminating or protecting them from it, a consequence which the court failed to consider.

The hijab as a symbol of intolerance

The court in *Sahin*⁸⁶³ by asserting that the hijab is not compatible with a tolerant, secular society respecting rights and freedoms of others appears to be politicizing the issue on the grounds of the surge of extreme political movements. The court here is imposing its own failure in giving recognition to the fundamental freedom of religion and holding it inferior to the opinion that secularism is a pre-requisite to the enjoyment of human rights. Secularism does not mean the absence of religion altogether from the public sphere since the principle of toleration itself requires respect for diversity and difference.

⁸⁶¹ Ibid Tulkens dissenting judgement para 12

⁸⁶² Sevdal Clark, 'Female Subjects of International Human Rights Law: The Hijab Debate and the Exotic Other Female' (2007) 19 *Global Change, Peace and Security* 35

⁸⁶³ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

The *Dahlab*⁸⁶⁴ court's judgement was a first indication that the hijab worn by teachers in schools had the effect on the rights of others and some Islamic precepts were not compatible with the ECHR. Considering it was the first case where a state employee was involved and the issue was becoming an important one, it is surprising that the ECtHR judgment is limited in discussion in comparison to the Federal court. In neither case was there any evidence tendered to show that the applicants had imposed their own views on either the children in the *Dahlab* case, or other older university students in Turkey. Understandably there was a requirement from a state employee to be seen as religiously neutral in a state school, even though Muslim pupils were allowed to wear Muslim dress. However the requirement for a university student to be religiously neutral in classes cannot be readily understood as it is the state or state employees who are required to be neutral and not the students. There was no intolerance of others' beliefs demonstrated in either case, nor were there any indications of violent protests. Although Leyla Sahin the applicant did organise a peaceful protest at the university's rules on restricting the wearing of the hijab, but at no point of her stay at the university was she linked to any contact or belonging to extreme groups. Despite the lack of any link between the applicant and extremist movements, the court in *Sahin* informed by the state's arguments is suggesting that by manifesting the requirements of Islam, as in the applicant's case, it sends out a message of intolerance, whilst the Turkish principle of secularity is a principle of tolerance under threat from fundamentalism or as the court notes 'political Islam'.⁸⁶⁵

There was no concrete evidence of the proselytising effects or indeed any particular student who had been subjected to such effects by the hijab. Neither the university nor the court made any reference to the existence of such evidence, nor was there any evidence presented from any other university in Turkey. Yet the conjectural linking of the hijab to what could be considered proselytism and political Islam by one university, leads to Muslim women in every Turkish university to be deprived of their right to freedom of religion. This reasoning follows what can only be described as illogical, as it suggests that the approach taken by the court was that, as there were fundamentalist political groups in Turkey who believe Muslim women should wear the hijab in public spaces, any restriction on the wearing of hijab would be Article 9 compliant.

⁸⁶⁴ *Dahlab v. Switzerland*, supra (n 27)

⁸⁶⁵ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 35

The correct approach to the issue should have been the court establishing the existence and the nature of activities such groups had been engaged at the university in question and whether such activities did indeed threaten public order at the university, and if so, were those students disciplined for the disruptive activities?. Furthermore if there were any activities by extremist groups trying to impose pressure on non-hijab wearing students to conform to their pressures, were any measures put in place by the university that proved unsuccessful and hence the ban was in response to that failure? But the court did not engage in such fact finding enquiry, had it done so it would not only have highlighted the weakness of the state's case but would also have alerted the court to the questionable approach it had adopted. Thus the court without any explanation seemed to have endorsed a relationship between the hijab and its fundamentalist connotations that disrupt public order and threaten Turkish secularism, a point to which Judge Tulkens made a strong objection noting that simply because the GC gave recognition to the importance of secularism for protection of democracy in Turkey, the court was still obliged to show that restricting the hijab was a democratic necessity, since religious freedom was also a founding principle of democratic societies.⁸⁶⁶

In declaring the hijab as a symbol of intolerance, the ECtHR seems to have relied on a hypothetical argument stating that the 'impact which wearing such a symbol which is presented as a compulsory religious duty, may have on those who chose not to wear it'.⁸⁶⁷ This line of reasoning is almost analogous to the *Dahlab*⁸⁶⁸ case except in the present case the 'others' are not children and has the hallmarks of conjecture as justification, especially since the court did not apply the same reasoning reciprocally. Had the court done so, it would have led to a discussion of the impact the prohibition may have on those who wear the hijab through choice. Such consequences could be being deprived of education and employment opportunities which would amount to gender discrimination being endorsed by the court as opposed to endorsing it. The reference to the impact on other students is a surprising approach for the ECtHR to take as McGoldrick notes:

University students will be mature adults who are in a context where tolerance is essential and diversity is often valued. Adults might be expected to be capable of

⁸⁶⁶ Ibid Tulkens dissenting judgement para 5

⁸⁶⁷ Ibid para 115

⁸⁶⁸ *Dahlab v. Switzerland*, supra (n 27)

dealing with or resisting any negative pressures emanating from another person's religious clothing or its external symbolism.⁸⁶⁹

The GC appeared to have adopted the chamber's approach, which in turn was based on the Turkish Constitutional court's view that the headscarf was a political statement, and therefore, could be restricted on the grounds of maintaining public order and to defend Turkey's constitutional principle of secularism. The GC relied on the following reasoning of the Chamber in what amounted to a political discourse linking the mere wearing of the hijab with extreme fundamentalist groups:

The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience. The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.⁸⁷⁰

This aspect of the judgement was rebuked by Judge Tulkens the dissenting judge from Belgium who recognised the negative stereotyping of the hijab and it being declared a symbol of extremism without ascertaining its meaning to the applicant:

Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to

⁸⁶⁹ McGoldrick, 'Extreme Religious Dress; Perspectives on Veiling Controversies', *supra* (n 859) 416

⁸⁷⁰ *Leyla Sahin v. Turkey [GC]*, *supra* (n 28) para 115

manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.⁸⁷¹

The majority in the court found that the wearing of the hijab was contrary to the principle of secularism and was illustrative of gender inequality, and therefore found no violation of the applicant's Article 9 rights. But the court failed to address the applicant's arguments that, the same values of pluralism, respect for the rights of others and equality before the law of men and women should allow her to succeed in wearing the hijab.⁸⁷² Regrettably the court was more concerned with upholding Turkey's secularism, without which it would not have been able to comply with Convention requirements instead of the applicant's Article 9 rights, resulting in the state authorities being afforded a wide margin of appreciation. An important opportunity was lost by the GC to exercise greater supervisory jurisdiction and lay down some foundational principles upholding the right to manifest one's religion using symbols. Instead the court chose to hide behind the shield of a wide margin of appreciation on the grounds that there was a lack of consensus amongst the contracting states. The ECtHR simply accepted the Turkish Constitutional court's reasoning that, secularism is a defender of democratic values and as such prevents state preferences to specific religions or beliefs, thereby protecting individuals from religious fundamentalists and the 'freedom to manifest one's religion could be restricted in order to defend those values and principles'.⁸⁷³ The ECtHR found these principles to be in tune with Convention values, stating that they are 'in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey'.⁸⁷⁴

Incompatibility of the hijab as religious right with secularism

The ECtHR cited the *Refah Partisi*⁸⁷⁵ case, in which the court referring to principles of secularism noted that 'An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention'.⁸⁷⁶ The *Sahin* court here appears to weigh secularism against freedom of religion, instead of looking to harmonise the two and leaves open a question that if secularism is compatible with convention values, then secularism should also be able to meet the requirements for protection of religion. And as the court deems the state

⁸⁷¹ Ibid Tulkens dissenting judgement para 10

⁸⁷² *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 101

⁸⁷³ Ibid para 113

⁸⁷⁴ Ibid para 114

⁸⁷⁵ *Refah Partisi and Others v. Turkey [GC]*, supra (n 662)

⁸⁷⁶ Ibid para 93

as an impartial entity, that accommodates or organises religious pluralism, there will no doubt be friction between religious groups albeit they belong to the same religion as in Turkey. The role of the state in such circumstances is 'not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other' as stated in *Serif v. Greece*.⁸⁷⁷ Yet elimination of religious pluralism is exactly what Turkey was aiming to do by preventing those Muslim students, who believed it was their religious duty to wear the hijab in public from being able to do so in universities.

The role of the Turkish state in this respect was thus to ensure that all groups were able to manifest their beliefs autonomously without any external influences, whether by wearing the hijab in university or freedom from being pressurised into wearing it. This duty should have been discharged by the Turkish authorities and the court should have probed the question otherwise it leads to a gap in any later proportionality analysis. However this did not happen and no such evidence was presented or any question raised by the court in this respect. According to Martinez-Torron the ECtHR appears to have applied the principle of state neutrality in a distorted manner whereby it has allowed the state to remove visibility of religion from the public space. He claims that as in *Dahlab* 'the court seemed to take it for granted that the neutrality of the public sphere is best served when religion is absent or at least invisible'.⁸⁷⁸ It is thus paradoxical that the same neutrality that prevents the state judging religious doctrines is being used to justify the negation of manifesting religious beliefs by way of prohibiting hijab in educational establishments.⁸⁷⁹

The Turkish government and the European court failed to demonstrate that Turkish secularism and public order was under threat and arguably both the state and the court were attempting to preserve public order and secularism. This led to judge Tulkens asserting in very strong terms that the court had failed to provide real protection to religious practices by intervening and exercising genuine judicial supervision:

The Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic

⁸⁷⁷ *Serif v. Greece* App no 38178/97, (14 December 1999) para 53

⁸⁷⁸ Javier Martinez-Torron, 'Freedom of Religion in the European Convention on Human Rights Under the Influence of Different European Traditions' in Mary Ann Glendon and Hans F. Zacker (eds), *Universal Rights in a World of Diversity: The Case of Religious Freedom* (The Pontical Academy of Social Sciences 2011)345

⁸⁷⁹ *Ibid*

headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a 'pressing social need'. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples. Such examples do not appear to have been forthcoming in the present case.⁸⁸⁰

The court seemed to have sided with Turkey in lending a hand in controlling to what it termed as 'political Islam' at the expense of engaging in a meaningful discussion on how the headscarf threatened the principles of secularism. The *Sahin* case had undertones of the court's previous jurisprudence as a mechanism to control political Islam which had already commenced with the *Refah Partisi and Others v. Turkey*.⁸⁸¹ In this case, just like *Sahin*, the court adopted the use of terms such as 'political Islam' and 'Islamic fundamentalism' quite loosely, without explaining what the terms mean, and why they are being used without any demand of evidence from the state. The Grand Chamber in *Refah Partisi* upheld the Turkish Constitutional Court's decision to dissolve the *Refah Partisi* Party that was in government on the grounds of the political activities the party was engaged in, which included the imposition of Sharia law, encouragement of wearing headscarves in public establishments and setting up a plural legal system threatening the principles of secularism. The action was commenced under Article 11 of the ECHR, the right to freedom of association.

The Grand Chamber in *Refah Partisi*⁸⁸² took a surprising approach by departing from its previous treatment of similar issues involving previous political parties, resulting in opposite decisions.⁸⁸³ The European court in the past has described the dissolution of a political party as a 'drastic' and a 'radical' step,⁸⁸⁴ but it had done just that, not simply a dissolution of a political party, but one that was in power. To have dealt with similar issues in the past should have been ample opportunity for the European court to develop its jurisprudence on actions raising multiple issues that include political parties, democracy, human rights, secularism and religion

⁸⁸⁰ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 5

⁸⁸¹ *Refah Partisi and Others v. Turkey [GC]*, supra (n 662)

⁸⁸² Ibid

⁸⁸³ *United Communist Party of Turkey and Others v. Turkey [GC]* App no 19392/92, (30 January 1998); *Socialist Party and Others v. Turkey [GC]* App no 21237/93, (25 May 1998); *Freedom and Democracy Party (Ozdep) v. Turkey [GC]* App no 23885/94, (8 December 1999)

⁸⁸⁴ *Socialist Party and Others v. Turkey [GC]*, ibid para 51

and how each element interacts with the others. Yet in both cases it failed to do so. One concern about both decisions is the penetration of political motives into what should have been purely legal judgements, the avoidance of political motivation or influence is something which the court had proud history of, but both judgements fail to reflect that.

Turkey used the concept of ‘militant democracy’⁸⁸⁵ a form of action that itself is undemocratic in order to dislodge an extreme party in power, which led Boyle to argue that the Grand Chamber judgement was ‘wrong and unfortunate’ and the opinion of the minority judges who held the dissolution of the party was disproportionate, is to be preferred.⁸⁸⁶ According to Boyle, the criticism doesn’t come from the dissolution of the party but the ‘court’s application to the facts of this case in the light of Convention law.’⁸⁸⁷ Just like the *Sahin* case⁸⁸⁸, in *Refah Partisi* the ECtHR deferred to the state’s argument that the government should be removed from power on the grounds that it was a centre of activities contrary to the principles of secularism; one of these activities being encouraging the wearing of headscarves in public establishments. The two dissenting judges Haşim Kılıç and Sacit Adalı in *Refah Partisi* were of the opinion that in a pluralist system there should be room for debate about ideas thought to be disturbing or even shocking, echoing the judgement of *Handyside*.⁸⁸⁹ However, the Grand Chamber agreed with Turkey dissolving the *Refah Partisi* party, noting that limitations can be imposed on Article 9 rights with respect to religious affiliation and use of the hijab.⁸⁹⁰

It is a concern for religious freedom, a fundamental democratic right, when the Grand Chamber accepts the Turkish government’s argument that encouraging the wearing of the headscarf by the chairman of the party before it was in government⁸⁹¹ amounts to a reason for dissolution of the party. This is not only extraordinary, but indicates the association of the headscarf with an extreme religious ideology, an association, which is an affront to the woman who wears it as a manifestation of her religious belief and is beginning her life as a student,

⁸⁸⁵ A term coined in Karl Loewenstain, ‘Militant Democracy and Fundamental Rights’ (1937) 31 American Political Science Review 638

⁸⁸⁶ Kevin Boyle, ‘Human Rights, Religion and Democracy: The Refah Partisi Case’ (2004) 1 Essex Human Rights Review 1 <http://projects.essex.ac.uk/ehrr/vol1no1.html> accessed 18 November 2010

⁸⁸⁷ Ibid 4

⁸⁸⁸ *Leyla Sahin v. Turkey* [GC], supra (n 28)

⁸⁸⁹ *Handyside v. United Kingdom*, supra (n 630) para 49

⁸⁹⁰ *Refah Partisi and Others v. Turkey* [GC], supra (n 662) para 91-92

⁸⁹¹ Extracts of the speeches at para 25 chamber judgment “... when we were in government, for four years, the notorious Article 163 of the Persecution (Torture) Code was never applied against any child in the country. In our time there was never any question of hostility to the wearing of headscarves...” “... [University] chancellors are going to retreat before the headscarf when Refah comes to power”.

tarnished with an incorrect reading of the meaning of the headscarf; a dangerous fundamentalist symbol of intolerance contrary to secularism.

Secularism versus political and religious expression before the ECtHR

The ECtHR tainting the hijab as a symbol of gender inequality, intolerance and political Islam does not resonate with its own judgement when it concerns freedom of expression. For example in *Gunduz v. Turkey*⁸⁹² the applicant participated in a debate on a television programme that was broadcasted live. The applicant in his capacity as a religious leader with the intention of giving a presentation on the sect he belonged to, which attracted a lot of attention due to the black robes they wore, the manner in which they chanted and the sticks carried by its members. The programme lasted a number of hours and involved discussions via live link with other commentators. After initial discussions, he mounted an attack on live television on secularism, democracy and Kemalism. The following is an extract of some of the statements he made:

Anyone calling himself a democrat, secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious... This secular ... system is hypocritical ...; it treats some people in one way and others in another way ... I am saying these words while fully aware that they constitute a crime under the laws of tyranny ... Why would I stop speaking? Is there any other way than death?⁸⁹³

His comments then became more offensive, one of them being that 'If [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a [bastard] ...'⁸⁹⁴ He was charged with a criminal offence of 'inciting the people to hatred and hostility on the basis of a distinction founded on religion' by the Turkish authorities. He brought an action to the ECtHR under Article 10 ECHR that this amounted to a restriction on his right to freedom of expression. The European court agreed with him holding that the state's actions in convicting him was a violation of his Article 10 right to freedom of expression, the court noting that:

Expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending

⁸⁹² *Gunduz v. Turkey* App no 35071/97, (4 December 2003)

⁸⁹³ *Ibid* para 15

⁸⁹⁴ *Ibid*

sharia, without calling for violence to establish it, cannot be regarded as ‘hate speech’...⁸⁹⁵

It is then questionable why someone who attacks secularism and democracy in Turkey, including an attack on people’s morality whilst defending Sharia is found to be protected by the court. Yet a peaceful Muslim student who wears a hijab to university without showing any signs of intolerance or offence to others, who had no intention, nor did she actually incite anyone to wear the hijab, is considered such a dangerous a threat to Turkish secularism and is not afforded the same protection by the Convention.

Such a disparity in the application of the convention principles is apparent in the court’s treatment of the *Sahin*⁸⁹⁶ case where her article 9 and 10 rights were denied whilst Gunduz’s Article 10 rights were protected. In both cases there were important rights involved considered fundamental in a democratic society but indifferent treatment where a restriction in *Sahin* was considered necessary but not in *Gunduz*. This can only suggest that in terms of the court adjudicating on democratic values, such as secularism and the rights of others, the ECtHR is inconsistent as the *Gunduz* decision clearly challenges the court’s own reasoning in *Sahin*. Similarly in the recent case of *Murat Vural v. Turkey*⁸⁹⁷ concerning an applicant who brought an action under Article 10 because he was imprisoned for pouring paint on a statue of Atatürk, which was a criminal offence under Turkish law. He argued that he was exercising his freedom of expression and that his actions were to express his dissatisfaction with the Turkish authorities, who were running the country in accordance with Kemalist ideology and his actions amounted to criticising the ideology itself. The ECtHR held that his imprisonment for his acts breached his Article 10 rights. The court’s differential treatment between those claiming Article 9 rights and those who claim the other personal freedom rights such as private life and freedom of expression means that the Article 9 applicant is at a detriment, as it affords far less protection, a view also adopted by Lewis who asserts that the ECtHR is ‘guilty of disparity of treatment’⁸⁹⁸ whilst McGoldrick notes that:

Where religious dress is associated with conveying an element of political speech or as part of a political process it might be expected to benefit from the high

⁸⁹⁵ *Gunduz v. Turkey*, supra (n 892) para 51

⁸⁹⁶ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁸⁹⁷ *Murat Vural v. Turkey* App no 9540/07, (21 October 2014)

⁸⁹⁸ Tom Lewis, ‘What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation’ (2007) 56 *International Comparative Law Quarterly* 395, 395

protection afforded to political speech and so restrictions on it would be difficult to satisfy. However...such religious expression via dress has not been highly protected and restrictions have been more readily accepted as justified in a number of contexts.⁸⁹⁹

The margin of appreciation and proportionality analysis

The GC having found that there was a basis for the restrictions on wearing the hijab under Turkish law, for the aims of protecting the rights and freedoms of others and protection of public order, which are legitimate aims under Article 9 (2) leaving the question of necessity of the restrictions in a democratic society to be addressed. For the purposes of the review by the court, the main reason advocated for prohibiting the hijab in universities by the Turkish state was to avert the potential for the rise in fundamentalism and to maintain public order. It is in this respect that the state was afforded a wide margin of appreciation. The GC during its discussion of the standard of review stated the principle of subsidiarity in that national authorities were better placed to assess local necessities. And since the question was one of regulating the relationship of religion and the state, the specific restrictive measures were up to a point left to the state concerned as it is in a better position to understand the national context.⁹⁰⁰

Even though the state is afforded a level of deference, the court can review decisions to ensure restrictions are justified and proportionate, thus the margin of appreciation goes hand in hand with the court's supervision.⁹⁰¹ However, the court somewhat dampens the intended supervision straight away when it refers to the special importance given to the role of the national decision making body stating that 'This will notably be the case when it comes to regulating the wearing of religious symbols in educational establishments...'⁹⁰² This is rather a surprising reference, particularly as the court had already stated the importance of the national authorities in matters of religion and the state and in the absence of any previous precedents concerning religious symbols and higher educational establishments, suggests the GC may already have been primed to give an additional level of deference where religious symbols were concerned.

⁸⁹⁹ McGoldrick, 'Extreme Religious Dress; Perspectives on Veiling Controversies', supra (n 859) 401

⁹⁰⁰ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 109

⁹⁰¹ Ibid para 110

⁹⁰² Ibid para 109

The court in its determination of the width of the margin of appreciation and the subsequent intensity of the review should consider factors such as the seriousness of the interference, the nature of the right involved and the position of the applicant in its assessment of whether the interference was necessary.⁹⁰³ But this assessment is lacking in the judgement, had it been considered the court would have given effect to the applicant's assertions that she wore the hijab through her own free will without any pressure from someone and her intentions for wearing it were not to place any pressure on any other student to do so. From the facts the applicant did not associate with any fundamentalist group, and neither did her motivations for wearing of the hijab give rise to the link between her wearing it and political Islam. In this case freedom of belief and religion was at stake which by the court's own jurisprudence is fundamental to a democratic society⁹⁰⁴ and the effect on the applicant in her pursuit of higher education could have been and indeed was severe. Yet the court does not engage in discussion of such important factors before declaring a wide margin of appreciation to Turkey leading to a flaw in the court's determination of the width due to a relaxed scrutiny.

A state is entitled to and at times it is necessary to limit individual rights, in order to ensure the rights of others are respected. The Turkish government had a duty towards those who did not agree with the wearing of the hijab and fundamentalism was on the rise. This duty extended to protect those who wanted to keep the public space secular and free from religion as well as from influence of those who do, as the suggestion could be that those who do not wear the hijab are not good Muslims. The same reasoning and correctly so, was adopted by the UK domestic case *Shabina Begum*⁹⁰⁵ except there was strong evidence that by allowing one school pupil from all the others to wear a jilbab, would place psychological pressure on the others who would be seen as non-conformist to their Islamic faith, and there was evidence to this effect from the other students. But in *Sahin* the court did not make any reference, nor was there any evidence tendered by the Turkish authorities of any specific instances of any movements of extremists within the university, who had been attempting to impose their religious beliefs on other students. And if there were any instances where the measures taken to prevent that happening again were insufficient? Judge Tulkens in her dissenting opinion highlights the court's failure to draw a distinction between, those who wear the hijab as a

⁹⁰³ *Buckley v. United Kingdom*, supra (n 642) para 74

⁹⁰⁴ *Kokkinakis v. Greece*, supra (n 604)

⁹⁰⁵ *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School [2006] UKHL*

religious obligation and through free choice and those extremists who wear it to impose their views on others.⁹⁰⁶

The other ground put forward by the Turkish authorities for holding that there was a pressing social need, was the need to prevent a threat to the public order at the university. This ground was also accepted by the court without any references to instances of public disorder at the university. There had been peaceful protests by the applicant with no resulting disorder or complaints of any threats to other students. But despite the state's failure to reach the standard of proof, the court still deferred a wide margin of appreciation. It can be argued that the court was motivated by an endeavour to control political Islam, at the expense of adhering to an already questionable bandwidth of the margin of appreciation. Particularly since the court did not inquire into the issue of whether any of the other Turkish universities also viewed the hijab as a threat to public order at their campuses. And if so, were the extremist movements referred to by the court operational at other universities in trying to impose their extreme religious views via the hijab?⁹⁰⁷ In the *Karaduman*⁹⁰⁸ case where a higher education student was prevented from graduating in her studies because she refused to remove her hijab for a photograph for the diploma, the court also failed to examine this issue attracting criticism from Evans.⁹⁰⁹ It is contended that this assessment by the court was a crucial one and since the court accepted there was an interference with the applicant's right under Article 9, the burden of justifying interference was on the university. Thus any nexus between the hijab and extremist groups and the hijab being a threat to public order, was for the university to prove, which it failed to do so, before allowing a wide margin of appreciation to Turkey. The use of mere affirmations by the Turkish authorities instead of evidence by way of concrete examples of the threat posed by the hijab was a concern clearly echoed by Judge Tulkens:

Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice: they must be supported by

⁹⁰⁶ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 10

⁹⁰⁷ The court appeared to have discharged their responsibility on this issue at para 121 by stating that the university was better placed to evaluate local needs, conditions or requirements of a particular course, even though the issue was not just relevant to the course but one of the exercise of fundamental rights

⁹⁰⁸ *Karaduman v. Turkey [Com Dec]*, supra (n 728)

⁹⁰⁹ Evans, *Freedom of Religion under the European Convention on Human Rights*, supra (n 678) 206

concrete examples...Such examples do not appear to have been forthcoming in the present case.⁹¹⁰

The assessment of the European consensus on the issue of prohibiting hijab in universities is an important factor in the court's determination of the width of the margin of appreciation. This is because it acts as an important yardstick for the European court to use, as practices and values of societies change over a period of time and since the Convention is a living instrument,⁹¹¹ the ECtHR needs to be mindful of this. It has been stated frequently by the court that the lack of consensus at European level on the upholding of an individual's right results in a wide margin of appreciation and the court in *Sahin*⁹¹² invoked the same approach but with a defective application of the principle. The court mentioned Turkey, Albania and Azerbaijan were the only ECHR member states, who had introduced regulations on restricting the hijab in universities, but did not directly compare Turkey to Albania and Azerbaijan. Instead the court proceeded on commenting in detail on the status of the hijab in Germany, France, UK, Belgium, Austria, Netherlands Switzerland, Spain, Sweden and Finland,⁹¹³ none of which prohibited the hijab in universities.

It is contended that the lack of regulation on religious headwear at universities in European states indicated that there was European consensus on the issue of hijab at universities, and a clear indication that the need to prohibit was not there. The court's reasoning in *Sahin* that there was a lack of consensus on the issue of hijab and affording a wide margin to Turkey was wrong, as other than Turkey, only Azerbaijan and Albania restricted the hijab in universities. This indicates that there was indeed a European consensus, as none of the other states felt that restrictions were necessary. This view is shared by Marshall,⁹¹⁴ Gibson⁹¹⁵ as well as Judge Tulkens in her dissenting judgement, who not only finds lack of consensus, but also a lack of supervision by the court that goes hand in hand with the margin of appreciation, particularly as the issue of restricting the hijab was not simply a local one concerning Turkey.

The court afforded Turkey a wide margin accepting the state's argument that it was necessary to protect the principle of secularism. This principle is protected by Turkey's constitution and is

⁹¹⁰ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 5

⁹¹¹ *Tyrer v. United Kingdom* App no 5856/72, (25 April 1978)

⁹¹² *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹¹³ *Ibid* paras 56-57

⁹¹⁴ Marshall, 'Freedom of Religious Expression and Gender Equality: *Sahin v Turkey*', supra (n 852) 458

⁹¹⁵ Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66 *The Cambridge Law Journal* 657

directly linked with the state's history, where the public at large had acquiesced to keeping religion out of the public sphere; thus a corresponding duty on the state to give effect to it by prohibiting the hijab a religious symbol in public institutions keeping the public sphere free from religion. Although historically there is no evidence that the founder of Turkish secularism Mustafa Kemal Atatürk himself prohibited the hijab, or attempted to remove it from public institutions. The court noted that when it came to regulating the wearing of religious symbols in educational establishments, especially since there was a diversity of approaches taken by national authorities on the issue, it was not possible to discern throughout Europe a uniform conception of the significance of religion in society and that the meaning or impact of religious symbols would differ according to time and context.⁹¹⁶

The application of these principles in this respect was to Turkey's position as a secular state, where the essence of keeping the public sphere secularised was being threatened by fundamental movements. And thus the choice and method used to protect the rights of others is left to the state in line with what is the most appropriate for the time and context. The authorities did not bar anyone from praying as required by their belief so from the government's perspective they had acted proportionally; it was the least onerous means of achieving their aim. However, the court failed to examine the issue in detail, which is evident in the judgement, as the court simply accepted that Turkish secularism was in harmony with the rule of law and human rights and incompatible with the hijab.⁹¹⁷ The court did not discuss how Turkish secularism was defined, or provide any reasoning as to how such a conclusion was reached. Rather it is heavily reliant on the court's finding that secularism was without doubt the fundamental principle of the state and that was in harmony with the rule of law and human rights, even though the court and the Turkish state failed to state how that compliance was achieved. In the absence of such reasoning the court leaves open a flaw that Turkey could take any measure restricting people's freedom of religion and belief in the name of secularism which could be deemed compatible with Article 9 rights.

Restrictions at primary⁹¹⁸ and secondary⁹¹⁹ school level have been imposed in some member states and the rationale behind that restriction is justifiable when contrasted with *Sahin*.⁹²⁰ For

⁹¹⁶ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 109

⁹¹⁷ Ibid para 114

⁹¹⁸ *Dahlab v. Switzerland*, supra (n 28); *Azmi v. Kirklees Metropolitan Borough Council [2007] IRLR 434* (EAT; *Fereshta Ludin*, BVerfG, 2 BVR 1436/02 924 September 2003)

⁹¹⁹ *R (Begum) v. Governors of Denbigh High School [2006] UKHL 15*; *X v. Y School [2007] EWHC 298* (Admin); *The French Headscarf Ban in schools*

example, in *Dahlab*⁹²¹ the primary school teacher prohibited from wearing her hijab was a personification of the neutral state education system, and had to comply with the requirement of state neutrality with respect to religious expression in the class room. Thus, the prohibition could be viewed as proportional to the aim pursued by the state, although the reasoning of the court was based in the absence of any empirical evidence on the proselytising effect of the hijab on young children. Judge Tulkens in her dissenting opinion in *Sahin* also points out that the grand chamber simply evaded the supervision it was required to exercise over Turkey in this instance. She was of the opinion that this was particularly important since the issue wasn't just one of local importance but one of importance to all member states.⁹²²

On the issue of proportionality the Grand Chamber in *Sahin* did not make clear how it applied the requirement of proportionality to the facts of the case nor did it refer to any of the ECtHR jurisprudence on the issue . Instead, it simply places total reliance on the Turkish court's assessment of the proportionality of restrictions imposed by the university.⁹²³ The court seemed to be indicating that once a legitimate aim was established by the court, the application of the proportionality criterion would not question whether the impugned measures, by way of the university's internal rules met the necessity of the prohibition of the hijab on university premises. A full proportionality analysis was crucial since the applicant's religious right was being limited. This analysis allows a determination of whether the means used by the university disclosed a relationship to the legitimate aims pursued, which were protecting public order and the rights and freedoms of others, in other words the restriction was necessary in a democratic society. The necessity element is pivotal to the proportionality doctrine as the religious right of the applicant was one classed as fundamental by the court, requiring a balance to be struck between conflicts of rights. The proportionality of the measure is also intricately linked to the application of the margin of appreciation, which unless a proportionality analysis is carried out is likely to be too wide, which is why it is described as 'corrective and restrictive of the margin of appreciation'.⁹²⁴

⁹²⁰ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹²¹ *Dahlab v. Switzerland*, supra (n 27)

⁹²² *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 5

⁹²³ '...having found that the regulations pursued a legitimate aim, it is not open to the court to apply the criterion of proportionality in a way that would make the notion of an 'institution's internal rules' devoid of purpose' para 121

⁹²⁴ Macdonald, Matscher and Petzold, supra (n 633) 79

In *Sahin*⁹²⁵ the applicant raised the issue that restrictions on her wearing the hijab would lead to no alternative choice in pursuing her education. This lack of an alternative should have been an important factor in the court's determination of the necessity of the proportionality of the measure deemed necessary by the ECtHR established principles. Yet the court did not address this issue when clearly in its previous judgement in *Cha'are Shalom Ve Tsedek v. France*⁹²⁶ the Grand Chamber considered it an important factor. In this case the court found no breach of the applicants' Article 9 rights when the French state's refusal to grant them access to slaughterhouses in order to performing ritual slaughter for 'glatt meat' in accordance with the ultra-orthodox religious prescriptions. This was on the grounds that supplies of the 'glatt meat' were available from Belgium which the applicants could resort to. This points to an unwillingness of the court just as it did in *Dahlab* to listening to the voices of those concerned as here the applicant was clearly able and did in fact exercise her free will and freedom of action in wearing the hijab but she is being denied her effective freedom; a right to pursue a higher education on an equal footing with Muslim men. Instead the court offered a weak and a limited reference to the proportionality of the measures by stating:

Firstly, the measures in question manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance. Secondly, the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement to weigh up the various interests at stake. The university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system. Lastly, the process also appears to have been accompanied by safeguards – the rule requiring conformity with statute and judicial review – that were apt to protect the students' interests...⁹²⁷

The court did engage in a limited discussion of balancing the conflicting rights, but it suggested that duties imposed by the habitual forms of religious observance were not affected and that there was a reasonable relationship between the means used and the aim pursued. Even though the court refers to the Turkish authorities having judiciously sought the least restrictive method, the actual means considered as alternatives are not cited. Ringelheim notes that the

⁹²⁵ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹²⁶ *Cha'are Shalom Ve Tsedek v. France [GC]*, supra (n 729)

⁹²⁷ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 159

court eluded a difficult question relating to the proportionality of the legitimate aim and the means to achieve it:

Ms *Sahin* did not represent the state and was not in a position of authority with respect to other students. It was not claimed that the way she had personally worn the headscarf had caused any disruption or been accompanied by provocative or proselyte behaviour. Yet the court abstains from verifying whether less restrictive measures, such as sanctions limited to individuals who would have exerted pressure, would have permitted the pursued aims to be reached.⁹²⁸

The court did not refer to any test of proportionality, rather the dissenting judge Tulkens offered a tripartite test that should have been used.⁹²⁹ This not only demonstrates a real lack of an appropriate level of scrutiny of the proportionality of measures by the court in *Sahin*, but also indicates a weakness with judgements of the ECtHR in general, as there is no universal test for proportionality that is consistently applied. Even Judge Tulkens does not elaborate on her test but simply asserts that the reasons for the restriction on the hijab were not relevant and sufficient without referring to other means of a less restrictive nature.

In the judgement the court attempts to justify the proportionality of the measures by stating that:

It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained...⁹³⁰

⁹²⁸ Julie Ringelheim, 'Rights, Religion and the Public Sphere' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012) 303

⁹²⁹ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 2: 'Owing to its nature, the Court's review must be conducted in concreto, in principle by reference to three criteria: firstly, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; secondly, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing interests'

⁹³⁰ *Ibid* para 120

This judicial attempt at a proportionality analysis is weak, as it is questionable how engaging in a dialogue with those whose rights were at stake could ever be sufficient to satisfy the requirements of proportionality analysis. No evidence was tendered, nor was there any discussion as to how the hijab posed a threat and or caused public disturbances at the university, or the way in which the hijab places psychological pressure on those women who do not wear it, and whether such a threat to those who do not wear the hijab was present in every Turkish university. If the hijab did indeed have such a link then it is questionable why it would only be prohibited in a university setting and not in all public places as surely the suggested power of coercion must be the same. It was a function of the ECtHR to assess the means used with the aim of establishing the proportionality of the measure concerned as part of its supervisory role, especially since the power of appreciation is not unlimited and goes hand in hand with supervision by the court. This supervision was particularly crucial since a fundamental right was at stake but the following statement by the court suggests an abandonment of any form of such strict scrutiny:

Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's 'internal rules' devoid of purpose.⁹³¹

A mere symbolic linking of the symbol with political Islam perceived as a threat to Turkish secularism, without considering the many reasons a woman may wear the hijab for, does not for the purposes of proportionality demonstrate a reasonable relationship of the applicant's reasons for wearing the hijab, and the message transmitted by it to others. Otherwise such reasoning effectively signals a free hand to the Turkish authorities for the hijab to be restricted in all public spaces under the pretext of maintenance of public order.

Adoption of negative stereotypes by the ECtHR

There are a number of stereotypes associated with veiling held not only by non-Muslims but also by Muslims who question the obligatory nature of veiling. Some of these negative stereotypes of Muslim women have pervaded judicial reasoning in cases involving Islamic veiling in domestic proceedings, as well as those brought under the ECHR. There are numerous examples of national judges in European states who have referred to the religious status of veiling. For example Shadid and Van Koningsveld note that some judges in Belgium have commented on the religious status of the hijab such as 'There are a sufficient number of sects

⁹³¹ Ibid para 121

and/or groups in Islam where head-covering is not prescribed and even not practised' or that 'The Muslim Turkish Prime Minister appears in public without a veil'.⁹³² Such comments have not just been confined to national judges but even the ECtHR has fallen foul of the principle that the courts should not engage in discussing the legitimacy of religious beliefs held or whether religion does or does not prescribe a practice; that is a matter to be decided by the applicant subjectively.⁹³³ The legitimacy of a religious belief held is not easily appreciated by others, for example they may not understand the sacredness of the hair under the turban of a Sikh and why he protests so strongly when asked to remove it at airports,⁹³⁴ or why a Muslim schoolgirl does not want to wear shorts or take her hijab off during her sports classes,⁹³⁵ or indeed why a Muslim woman may want to cover her face in front of men.⁹³⁶

For the woman who veils it does not matter that the practice or belief held is one of a minority view amongst the other sects in Islam, as noted by Nussbaum in respect of those who engage in a practice considered non-standard 'If someone has a non-standard interpretation of his or her religion, it cuts no ice to say that the majority of that religion's members do not agree'.⁹³⁷ The ECtHR has engaged in inappropriate comments in relation to convictions held, for example in *Jehovah's Witnesses of Moscow v. Russia* the court has said: 'the rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in orthodox Christianity, or circumcision practiced on Jewish or Muslim babies...'⁹³⁸ Similarly with respect to the hijab, the ECtHR in *Dahlab* and *Sahin* has held the view that the hijab is not easily reconciled with the message of tolerance and respect for others and is a symbol of gender inequality.⁹³⁹ Such a stance does not just contradict the ECtHR own previous reasoning, but such judicial engagement in the legitimacy of beliefs is not only inappropriate,⁹⁴⁰ but also stigmatises the applicant leading to questioning their autonomy of choice in appropriating a particular meaning to the chosen practice in question.

⁹³² Wasef Abdelrahman Shadid and P.S. Van Koningsveld, 'Muslim Dress in Europe: Debate on the Headscarf' (2005) 16 *Journal of Islamic Studies* 35, 44

⁹³³ Evans, *Freedom of Religion under the European Convention on Human Rights*, supra (n 678); Martinez-Torron Javier, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 3 *Oxford Journal of Law and Religion* 363

⁹³⁴ *Phull v. France* App no 35753/03, (11 January 2005)

⁹³⁵ *Aktas v. France*, supra (n 769)

⁹³⁶ *El Morsli v. France*, supra (n 769)

⁹³⁷ Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*, supra (n 161) 79

⁹³⁸ *Jehovah's Witnesses of Moscow and Others v. Russia* App no 302/02, (10 June 2010) para 144

⁹³⁹ *Dahlab v. Switzerland*, supra (n 27); *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹⁴⁰ *Manoussakis and Others v. Greece*, supra (n 737) para 47

The ECtHR has adopted two common stereotypes with respect to the hijab; that it is an expression of or propagates Islamic fundamentalism and that veiled women are victims of oppression. The use of such stereotypes by the ECtHR in its jurisprudence has been noted by a number of commentators.⁹⁴¹ The first of the stereotypes where the court has erroneously arrived at the conclusion that the woman who wears a hijab, does so in order to propagate the fundamentalist nature of it as a symbol. She is viewed as dangerous for others and is an aggressor and a fundamentalist 'who forces values onto the unwilling and undefending'.⁹⁴² And as such has the ability to proselytise children, adult students in higher education and cause public disorder and protest. She also upsets the state with her symbol of intolerance, threatening the whole system of equality and neutrality guaranteed by a secular state. Although such an image of Muslim women who wear religious symbols is common in the mainstream media, political debate and feminist discourse, but for the court to import such images upon which legal reasoning is based on contradicts the spirit of the ECHR as well as human rights.

The hijab as a symbol of inferiority and oppression of Muslim women is the second stereotype that has gained prevalence in the ECtHR jurisprudence. The false assumption is that Muslim women are coerced into veiling which facilitates gender oppression by religion, community and family, a view which Bullock calls 'Popular Western cultural view'.⁹⁴³ The veiled woman in this stereotype strikes the image of the victim whose religion is gender oppressive and who is subjugated not only by her religion, but also fathers, brothers and husbands who force the veil upon the docile and passive victim. And this victim does not speak out, as she has internalised the oppression having adapted her religious preferences to be in tune to those who impose the practice on her and thus in great need of saving by the state via the ECtHR.

⁹⁴¹ William Paul Simmons, *Human Rights Law and the Marginalised Other* (Cambridge University Press 2011); Shadid and Koningsveld, *supra* (n 952); Evans, 'The Islamic Headscarf in the European Court of Human Rights', *supra* (n 678); Vakulenko, *supra* (n 144); Mancini, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism', *supra* (n 418); Hirschmann, 'Eastern Veiling, Western Freedom', *supra* (n 273); Droogsma, *supra* (n 171); Winter Bronwyn, 'Fundamental Misunderstandings: Issues in Feminist Approaches to Islamism' [Johns Hopkins University Press] 13 *Journal of Women's History* 9 Grace, *supra* (n 199); Zine Jasmin, 'Between Orientalism and Fundamentalism: The Politics of Muslim Women's Feminist Engagement' [Berkeley Electronic Press (BePress)] 3 *Muslim World Journal of Human Rights* 1080; Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 4 *Human Rights Law Review* 707; Lourdes Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: Risks of Stereotyping and Naturalising' (2014) 10 *International Journal of Law in Context* 195

⁹⁴² Evans, 'The Islamic Headscarf in the European Court of Human Rights', *supra* (n 678) 74

⁹⁴³ Bullock, *supra* (n 25) xxxviii

There is no doubt that there are women who have the hijab or the veil imposed on them by their family members. Indeed there are limited examples in qualitative research where Muslim women have acknowledged they veil or have done due to pressure from husbands or the community but not actual coercion.⁹⁴⁴ Or as in two Islamic schools in the United Kingdom who 'Taught their students that the face veil is a compulsory...religious practice for Muslim women'.⁹⁴⁵ However, such acknowledgements cannot drown the voices of all the other Muslim women who veil through their autonomous choice, particularly as the applicants who have come before the ECtHR had reminded the court of such choice-based decisions.

Both stereotypes were employed by the ECtHR against two women of the same group in the cases of *Dahlab*⁹⁴⁶ and *Sahin*.⁹⁴⁷ But surprisingly the court overlooked the conflict between the two stereotypes. On the one hand these applicants were painted with the image that they were walking symbols of fundamentalist Islam, actively pushing extremist agendas, even though there was no evidence presented of this, with the supposed effect that they were proselytising the young impressionable children in *Dahlab* and the mature and autonomous students in university in *Sahin*. Yet on the other hand, the same ECtHR seemed to be on a mission to save these two women from the gender oppressive practice they had adopted through religious and familial coercion, and as subjugated victims of this patriarchy that was so onerous, that the court and the respondent states in both cases had to save them from their plights. In Evans terms, both women transform from women who need rescuing from Islam to women from whom everyone else needs rescuing.⁹⁴⁸ And as attempts to control these women by the state are undermined by the families of girls, as in France where they are forced to remove their hijab in schools. Their parents remove them from schools and if they force girls to wear the hijab the state bans them, the contestation leading to a battle of cultural control.⁹⁴⁹ In both cases the voices being lost are those of the women who wear the hijab, not just by the state, religion and family but by the court as well, a point Evans thrusts bluntly:

When those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to

⁹⁴⁴ Bouteldja, *supra* (574) 138

⁹⁴⁵ *Ibid* 146

⁹⁴⁶ *Dahlab v. Switzerland*, *supra* (n 27)

⁹⁴⁷ *Leyla Sahin v. Turkey [GC]*, *supra* (n 28)

⁹⁴⁸ Evans, 'The Islamic Headscarf in the European Court of Human Rights', *supra* (n 819) 75

⁹⁴⁹ *Ibid*

engage with the complexity of modern religious pluralism, then religious freedom and pluralism are undermined and the notion of human rights degraded.⁹⁵⁰

Conclusion

Despite cases such as *Dahlab*⁹⁵¹ and *Sahin*⁹⁵² concerning religious clothing coming before the ECtHR, it has failed to grapple with reasons why Muslim women wear the hijab and that its different meanings is dependent upon the Muslim woman's own relational link with religious clothing. This contextual aspect of veiling is something the German Constitutional court commented on in the *Fereshta Ludin* case concerning a Muslim Teacher prohibited from teaching in a primary school on the grounds of wearing a hijab. McGoldrick correctly refers to the German Constitutional court on the issue of what a hijab actually means and symbolises, noting that 'the meaning of hijab could only be determined with reference to the person wearing it'.⁹⁵³ The judges in the majority also noted that the head scarf cannot be 'simply considered as a mere sign of suppression of women'.⁹⁵⁴ Yet the ECtHR failed to appreciate such important issues and instead gave weight at judicial level to negative stereotypes irrespective of the voices raised by the applicants. Instead of the court offering reasoned judgements it entered the domain of theological opinion, something the court had itself delivered warnings against. Such use of language not only blurred the reasoning of the court but failed to demonstrate the court's impartiality towards the applicants.

There appeared to be a departure from the established principles by the court, for example there is a level of dissonance with established principles when applying the limitation clauses of Article 9(2) in the *Sahin* judgement, where the GC accepts Turkey's aims of protection of public order and the rights and freedoms of others as the reasons for the university's decision.⁹⁵⁵ But it is evident from a later part of the judgement that Turkish secularism was the main force behind the decision as the court stated that 'It is the principle of secularism, as elucidated by the Constitutional Court ...which is the paramount consideration underlying the ban on the wearing of religious symbols in universities'.⁹⁵⁶ Indeed secularism may have been the prime motivation for Turkey and its constitutional court, but the ECtHR cannot and should not allow it to override freedom of religion, especially since no previous judgement of the

⁹⁵⁰ Ibid

⁹⁵¹ *Dahlab v. Switzerland*, supra (n 27)

⁹⁵² *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹⁵³ McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, supra (n 814) 113

⁹⁵⁴ Ibid

⁹⁵⁵ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 99

⁹⁵⁶ Ibid para 116

court has ever interpreted the legitimate aims under Article 9(2) to include secularism. The court was the place where the applicants placed reliance on, yet they were dealt with an additional blow; being silenced and subjected to contradictory stereotypes. The controversy and the reluctance to understand religious symbols according to Danchin is because Islam, as symbolised by the headscarf, is seen through the lens of state nationalism as a threat to the secular character of European states.⁹⁵⁷ This unease is not only evident by the prohibitions on veiling but other forms of Islamic symbolism such as the Swiss Minarets.⁹⁵⁸

⁹⁵⁷ Peter D. Danchin, 'Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law' University of Maryland Legal Studies Research Paper No 2007 - 42

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1058641> accessed 12 April 2010, 22

⁹⁵⁸ *Ouardiri v. Switzerland* App no 65840/09, (28 June 2011)

CHAPTER 5 - THE ECTHR AND THE FACE VEIL

Introduction

In the previous chapter the application of Article 9 ECHR to the hijab worn by a student in higher education and a teacher in a primary school was examined. The issues with the hijab were different as it didn't cover the face fully and the prohibition was in a specified location; in school and at university. This chapter examines the extension of those issues as the practice in question concerns full face covering not only in public institutions but in all public spaces. This chapter's focus is on the first ever case concerning the full face veil to come before the Grand Chamber, where the right to wear such face coverings are prohibited under French law. The ECtHR has upheld that law as compliant with Article 9 ECHR on the grounds that the full face veil interferes with the rights of other. The chapter analyses the arguments presented by the French state and the applicant, together with the court's assessment of those arguments, as well as the application of Article 9 jurisprudence to full face veiling in public spaces. The chapter then proceeds with the wider sociological arguments prevailing over veiling in public spaces and its impact on integration and social interaction, particularly its effect on communication. The discussion also engages in arguments on the court's failure to take account of the voices of those women who veil. Finally, arguments are presented on the inadequate consideration of the application of Articles 8 and 10 ECHR to full face veiling in the judgement and the influence of negative stereotypes related to veiling on the court.

S.A.S. v. France

In *Dahlab*⁹⁵⁹ and *Sahin*⁹⁶⁰ the European court had to deal with applicants who had been affected by restrictions on wearing the Islamic headscarf in educational settings by a teacher in *Dahlab* and a student in higher education in *Sahin*, although issues surrounding veiling and other religious symbols have been dealt with by national courts in other contexts, primarily in employment or the service sector. In *S.A.S. v. France*⁹⁶¹ the Grand Chamber dealt with a case concerning full face coverings in public spaces for the first time, with the matter coming before it after the chamber relinquished jurisdiction under Article 30 ECHR and Rule 72 of the court with neither party objecting.⁹⁶² The case also attracted third party interventions by way of written submissions with the Belgium government given leave to take part in the hearing.⁹⁶³

⁹⁵⁹ *Dahlab v. Switzerland*, supra (n 27)

⁹⁶⁰ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹⁶¹ *S.A.S. v. France [GC]*, supra (n 29)

⁹⁶² Article 30 and Rule 72 enable the chamber to relinquish judgement on two grounds: if a case before it raises a serious question affecting the interpretation of the Convention or the protocols, or where the

The action was brought by a 24 year old Muslim female who is a French national against France's Law that 'prohibits the concealment of one's face in public places'.⁹⁶⁴ Under this law no one is permitted to wear clothing designed to conceal the face in public places,⁹⁶⁵ which are defined as a public highway, any place open to the public or assigned to a public service,⁹⁶⁶ unless authorised by legislation for health or occupational reasons or if worn in context of sports, festivities or artistic or traditional events. The penalty for breaching the law is a maximum of 150 euros or a requirement to follow a citizenship course.⁹⁶⁷ Anyone who uses threats, coercion, abuse of authority or office, on account of another's gender forces anyone to conceal their face would be punished with a one year prison sentence and a fine of 60,000 euros, with the prison sentence doubled if against a minor.⁹⁶⁸ The law had been drafted in neutral terms targeting concealment of the face as opposed to veiling per se.

The applicant voluntarily without any familial pressure wore both the burqa and the face veil as and when depending on her spiritual feelings, for example, during religious events such as Ramadhan. Her aim was not to annoy others but to feel at inner peace with herself and explained that she wore the niqab in public and private places but not systematically, for example, she would not wear it when visiting the doctor, meeting friends in a public place or socialising in public.⁹⁶⁹ She stressed that she did not expect to keep the veil on when asked for a security check at banks and airports and would remove it for identity verification purposes. She claimed the law breached her Article 3, 8, 9, 10, 11 and 14 ECHR rights for the following reasons: Article 3 because she would incur a criminal sanction if she breached the law and would also suffer from harassment and discrimination; Article 8 because the law prevents her choosing how to dress; Article 9 as the law prevents her from manifesting her religion and

resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, unless one of the parties to the case objects. The chamber does not have to state its reasons for relinquishment. Registry of the Court, 'European Court of Human Rights' (*Council of Europe*, 2014) <http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 10 July 2014

⁹⁶³ The third party interveners were: Amnesty International, Liberty, Open Society Justice Initiative, Article 19, Human Rights Centre at Ghent University and the Belgian government

⁹⁶⁴ Law no. 2010-1192 of 11 October 2010 entered into force on 11 April 2011.

⁹⁶⁵ Ibid s2

⁹⁶⁶ Ibid s3

⁹⁶⁷ The purpose of the citizenship course under s3 is to '...remind the convicted persons of the Republican values of tolerance and respect for the dignity of the human being and to make them aware of their criminal and civil liability, together with the duties that stem from life in society. It also seeks to further the person's social integration...'

⁹⁶⁸ s4 Law no. 2010-1192 of 11 October 2010

⁹⁶⁹ *S.A.S. v. France [GC]*, supra (n 29) paras 11-12

beliefs; Article 10 because it prevents her from wearing a face veil in public places which denies her dressing in a way that expresses her faith, religious, cultural and personal identity; Article 11 since she cannot assemble with others in public wearing a face veil and Article 14 because the French law would discriminate against her based on her gender, ethnicity and religion.

The French government's submissions

The French government argued that their first aim under Article 9 limitations was the need for identification which was necessary in order to prevent danger, protect safety of people as well as property and to fight identity fraud. Secondly, it was to secure the protection of the rights and freedoms of others by ensuring 'respect for the minimum set of values of an open democratic society'⁹⁷⁰ which entailed three important values. The first one of these values was the observance of the minimum requirements of life in society. The French government argued that the exposure of the face is important in human interaction compared to other parts of the body, since the face identifies the individual as a unique person, it also embraces shared humanity, as well as otherness and hiding the face is to break this social requirement and refusing to adhere to the principle of 'living together' (le 'vivre ensemble'). Secondly, the ban would promote equality between men and women, as concealing the face denied the women their existence as individuals, where their individuality is only exercised in private or exclusively female company. Thirdly, full face veiling effaces women from public spaces and was dehumanising and inconsistent with human dignity.

The government did not accept veiling was emancipatory and questioned the research reports presented by the third party interveners, on the basis that they were conducted using small samples (27 and 32) using the 'snowball method' that was not reliable and only provided a partial view of reality. The government argued the measure was proportional since it allowed women to wear other religious dress and in any event, the penalty is small. The government argued Article 8 did not apply as it targeted only public places where an individual's physical or private integrity was at stake and that Article 14 claims were ill placed since the prohibition was to address the discrimination to veiled women who become effaced from public space. Furthermore, the said law did not target Muslim women and effacement by the veil or burqa was incompatible with social existence. Finally the government argued that the restriction applied to everyone irrespective of the religious beliefs or gender.

⁹⁷⁰ Ibid para 82

The applicant's arguments

The applicant claimed the French law prevented manifestation of her Islamic belief in public and although the prohibition was 'prescribed by law'⁹⁷¹ it did not pursue the legitimate aim of 'public safety'⁹⁷² since the measure did not address specific instances or circumstances where the risk to safety is high, but instead was a blanket ban applicable to almost all public places. She also claimed that the state's justification, that the law is to ensure respect for 'minimum requirements of life in society' and the importance of exposed faces in French society, does not accommodate those cultural practices that do not share the same philosophy or non-visual communication. She asserted that the wearing of the veil was not to please men, but herself and her conscience, and an abstract idea of gender equality could deny personal choice to women who veiled, with the imposition of legal sanctions simply exasperating the inequality the measure was aimed at remedying.⁹⁷³ The applicant also argued that the government's claim that the prohibition was to achieve respect for human dignity was an attempt to justify this by basing it on the negative stereotypes that wearers of the veil were effaced.⁹⁷⁴

On the issue of whether the measure was 'necessary in a democratic society',⁹⁷⁵ the applicant argued that the state cannot validate religious beliefs. And that the prohibitory measure deterred women who veil from socialising and might breach the right to gender equality in International law, as noted by the Human Rights Committee's General Comment no.28.⁹⁷⁶ Furthermore, just because a measure has wide political support does not mean it is necessary in a democratic society, and even if the aim pursued by France was legitimate, it was not proportional, as it was not the least restrictive measure adopted by the state.

On the issue of public safety, the applicant argued that it should be enough for the state to incorporate identity checks at locations that are a security risk, which could involve removing the veil only when required. As for the state's argument in terms of 'respect for human dignity', the applicant asserted that the interests of those who oppose the veil, must be weighed against those of the women affected, for whom it means a choice between going against one's beliefs, stay at home or breach the law. All of which would be detrimental to

⁹⁷¹ As required by Article 9(2)

⁹⁷² Public safety is one of the legitimate aims contained under Article 9(2) under which the state can justify interference with Article 9(1) rights

⁹⁷³ *S.A.S. v. France [GC]* para 77

⁹⁷⁴ *Ibid* para 78

⁹⁷⁵ As required by Article 9(2)

⁹⁷⁶ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000)

them. Furthermore, her right to private life was affected by the prohibition in three ways: veiling was part of her cultural and social identity; the zone of private life in terms of social interaction, extended beyond the family circle and included a social dimension and that if she went out wearing a veil, there was a likelihood of hostility and exposure to criminal penalties. And In respect of Article 8 the threshold for necessity in a democratic society was higher compared to the limitation under Article 9 and that the state had not reached that in their argument.

The applicant's final argument was her Article 14 rights on grounds of sex, religion and ethnicity claiming this led to indirect discrimination between a Muslim woman who didn't veil and one who did, as well as between a Muslim woman and a Muslim man. Furthermore, the French law discriminated against a Muslim veil wearer who was bound by the law even during Ramadhan, whereas, it did not apply to Christians participating in festivities or celebrations such as Catholic religious processions, carnivals or rituals.

The Grand Chamber's assessment of the arguments

The GC found that the applicant's claim for violations of Articles 3⁹⁷⁷ and 11⁹⁷⁸ were manifestly ill founded and the claim under Articles 8, 9 and 10 was found admissible. The court acknowledged that an individual's personal choice of dress in public or private, is an expression of personality and part of private life protected by Article 8, and a restriction to that choice constitutes an interference with Article 8 rights, as it entails a dilemma for Muslim women between refraining from dressing according to religious belief or face a criminal penalty in doing so.

In terms of the two legitimate aims of public safety and the protection of rights and freedoms of others, the court accepted that the impugned measure sought to address issues of public safety and noted that during its legislative stages, the explanatory memorandum accompanying the Bill cited that as a possibility, which was also affirmed by the Constitutional Council and the Conseil d'état. On consideration of the second legitimate aim 'respect for minimum set of values of an open society' for which three values were highlighted: respect for gender equality, human dignity and minimum requirements of life in society which could be connected to the protection of rights of others, the court noted that these three values did not

⁹⁷⁷ *S.A.S. v. France [GC]*, supra (n 29) para 70 on the grounds that it did not satisfy the minimum level of severity required and therefore fell outside of the scope of Article 3.

⁹⁷⁸ *Ibid* para 73 on the ground that the applicant had failed to satisfy the court how the ban imposed by the French law would breach her right to freedom of association and discrimination against her

correspond with the legitimate aims stated in Articles 8(2) and Article 9 (2). The only aims relevant to the case on hand being 'public order' and the 'protection of rights and freedom of others' of which the public order is not an aim contained in Article 8(2) thus the court concentrated on the protection of rights and freedom of others.

The court held that a state cannot invoke gender equality when a practice was defended by women as with the applicant and on human dignity the court noted that no matter how essential it may be, a blanket prohibition on concealment of the face cannot be justified by the state. The court reminded that even though some members of society may perceive a full face veil as strange, veiling is an expression of cultural identity⁹⁷⁹ that is part of pluralism, a democratic value and that there is no evidence that the wearer of a veil intends to act in contempt against members of society or to offend the others' dignity. Finally, the court acknowledged 'respect for the minimum requirements of life in society' or as the government put it 'living together' can be associated with the protection of the rights and freedoms of others and thus the court needed to assess whether this aim was necessary in a democratic society.

The Grand Chamber's application of Article 9

The court found that it was not necessary to uphold the ban for reasons of public safety on the grounds that it would amount to a proportionate and legitimate aim only where there was a general threat to public safety, which the state had not shown. And that women who veil would have to give up, '...completely an element of their identity' whereas, the state could achieve its aim by a simple obligation on such women to identify and themselves, where there was a risk of safety to people and property or a suspicion of identity fraud. Thus a blanket ban could not be considered necessary in a democratic society for requirements of public safety under Articles 8 and 9.⁹⁸⁰

On the second aim of protecting the rights and freedoms of others the court accepted that the authorities placed particular emphasis on the problematic of concealment of the face with 'living together' in French society and that 'The systematic concealment of the face in public places, contrary to the ideal of fraternity, ... falls short of the minimum requirement of civility

⁹⁷⁹ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 35 where the identity aspect of veiling was also acknowledged by the court noting that 'Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity'

⁹⁸⁰ *S.A.S. v. France [GC]*, supra (n 29) para 139

that is necessary for social interaction⁹⁸¹ making the measure justifiable in principle, so long as it seeks to guarantee the conditions of 'living together'.

The court acknowledged that the French law to a certain extent restricted the reach of pluralism, as it prevents women who veil from expressing their personality and beliefs. But the court was convinced by the state's argument that the practice was incompatible with the ground rules of social communication and living together, which protected the principle of social interaction deemed essential for pluralism, tolerance and broadmindedness. The court concluded that whether someone should or not be allowed to wear a veil in public is a 'choice of society'.⁹⁸² Therefore the court would exercise restraint in scrutiny of compliance with the Convention by the state, as that would lead the court into scrutinising the balance that had been struck by means of a democratic process within the society in question. It further concluded that as there was a lack of consensus on the issue surrounding veiling in public, France has the benefit of a wide margin of appreciation.⁹⁸³ Since the margin afforded is a wide one, the court stated that the ban was proportionate to the aim pursued of 'living together' as an element of 'protection of the rights and freedoms of others' and thus no breach of either Article 8 or 9 of the ECHR.

For the applicant's claim under article 14 together with Articles 8 or 9, the court acknowledged citing *D.H and Others v. the Czech Republic*⁹⁸⁴ that a general ban that has a prejudicial effect disproportionately can be considered discriminatory even if that was not the intent or aim. However it indicated that it was only if a state measure did not have an objective and reasonable justification, in that it fails to pursue a legitimate aim or if it is not proportionate to the means and the aim pursued. The court concluded that in the present case this was not so thus no violation was found of Article 14 taken together with articles 8 or 9. The court held: unanimously, the complaints concerning Articles 8, 9 and 10 of the Convention, taken separately and together with Article 14 of the Convention, admissible, and the remainder of the application inadmissible; by fifteen votes to two. It further held that there has been no violation of Article 8 or 9; unanimously, that there has been no violation of Article 14 taken together with Article 8 or with Article 9 and unanimously, that no separate issue arises under Article 10, taken separately or together with Article 14.

⁹⁸¹ Ibid para 141

⁹⁸² Ibid para 153

⁹⁸³ Ibid para 154

⁹⁸⁴ *D.H. and Others v. The Czech Republic [GC]* App no 57325/00, (13 November 2007) para 175

Analysis of the Grand Chamber's reasoning

For the first time, a state, in this case France, by prohibiting concealment of the face has criminalised actions of Muslim women who veil in public spaces. Even if the veiled woman is welcomed or invited without any objection to her veiling, she is still caught out by the law, as she cannot enter that space without breaching the conditions of entering public space, which would be full exposure of the face, which in Vickers words 'criminalises the manifestation of religion'.⁹⁸⁵

There are several features of the case that warrant closer examination with the reasoning of the court demanding a critical examination, including some positive features of the judgement. Post *Dahlab*⁹⁸⁶ and *Sahin*⁹⁸⁷ it is refreshing to note that the court refrained from engaging in a theological opinion on the requirements or non-requirements of Islam in that veiling is not mandatory as most Muslim women do not veil. The court, rightly so, held that whether Muslim women feel veiling is obligatory is irrelevant and since the applicant's wearing of the veil was a religious motivation, it was sufficient for the action to be framed under Article 9.

The GC in *S.A.S.* took a major step forward in the right direction by putting to rest the gender inequality argument, a justification proving successful in prohibiting religious clothing that had prevailed in the ECtHR jurisprudence in its previous case law. The gender inequality and coercion argument featuring so vehemently in *Dahlab* and *Sahin* was rejected by the court on the ground that it did not apply as some women cover their faces through choice. This is a real recognition by the court that Muslim women can and do make choices voluntarily and can dispel the negative stereotype that Muslim women who wear the hijab or the veil are coerced and even if they are not, the choice is not a real choice as it is a feature of false consciousness. Although the court noted that gender equality arguments can lead to restrictions of Convention rights, but 'a state party cannot invoke gender equality in order to ban a practice that is defended by women... unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms'.⁹⁸⁸

Even though the recognition of Muslim women's choice by the court is a positive increment, there are still profound effects of the French law on those Muslim women who veil through

⁹⁸⁵ Lucy Vickers, 'Conform or be Confined: *S.A.S. v France*' (*Oxford Human Rights Hub*, 2014) <<http://ohrh.law.ox.ac.uk/?s=conform+or+be+confined>> accessed 18 July 2014

⁹⁸⁶ *Dahlab v. Switzerland*, supra (n 27)

⁹⁸⁷ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

⁹⁸⁸ *S.A.S. v. France [GC]*, supra (n 29) para 119

choice and wish to manifest their religious belief, as they would be confined to their homes, and being forced to disappear from the public space by the state in the absence of any evidence of oppression against them. This can only play into the hands of those men, if any, who do subjugate Muslim women leading to the opposite effect of the French laws, as these women would be prevented from employment, educational, recreational and social opportunities. Therefore, the French law would be replacing the social method of controlling Muslim women with a legal one and still dictating how Muslim women should dress; from the veiled to the unveiled. The confinement of these women to private places due to the law also give rise to assumptions by others, that the said women are oppressed, as it would be difficult to ascertain why they do not leave the house. The other effect in these circumstances is that a Muslim man who does not impose veiling on female members of his household, could be incorrectly attributed with a negative stereotype that he is a controlling husband, brother or father who does not allow these women out of the home.

The court recognised that laws criminalising veiling are a serious matter and may inculcate negative stereotypes, yet still went ahead and found that the prohibition was a legitimate aim. The use of criminal law is subject to criticisms also by Morondo Taramundi:

Criminal law (and, even more, criminal law on its own) cannot change hegemonic social practices and attitudes; that there is nothing to prove that prohibiting face veils will enhance Muslim women's power within communities, or protect them from gender violence, or hinder patriarchy.⁹⁸⁹

Yet according to Raday, the court had allowed too much deference to the applicant. She takes issue with the decision in *S.A.S.* on the grounds that 'The discriminatory impact of giving license to the full-face veil on women's autonomy and freedom of choice' were not satisfactorily considered.⁹⁹⁰ She challenges the court's reasoning based on women choosing to veil being the reason gender equality arguments were not invoked by the court. According to her, the court failed to take account of the harmful practices such as FGM and discriminatory practices such as polygamy, which under international law should be prohibited, irrespective of whether women defend these practices or not. Furthermore she argues that the consent

⁹⁸⁹ Dolores Morondo Taramundi, 'Women's Oppression and Face Veil Bans' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 226

⁹⁹⁰ Frances Raday, 'Professor Raday Comments on *SAS v France*' (*Oxford Human Rights Hub*, 2014) <<http://ohrh.law.ox.ac.uk/?p=12163>> accessed 4 August 2014

argument lacks empirical evidence arguing that ‘for every woman in a liberal democracy who chooses the burkha there are other women who are compelled to wear the burkha in the context of family or community patriarchal control’.⁹⁹¹ But what she fails to address is the question posed by McGoldrick that even if it can be accepted that veiling is an instrument of oppression, does that make it ethically worse than state compulsion not to wear it?⁹⁹² She further argues that full face covering depersonalises women in the field of social interaction and is harmful to women’s freedom of expression, also preventing women from accessing healthcare, gaining employment where facial communication is required and restricts their mobility by loss of field of vision.

Raday appears to rely on the weak and commonly cited arguments used by those who attempt to justify banning face veiling by Muslim women. First of all, there was evidence tendered by the intervening parties that demonstrated that not all women are forced to veil and those who were part of the study carried out by Brems show that they decide to veil through their own choice.⁹⁹³ Secondly, practices such as FGM are indeed harmful to women, especially since they are targeted against young girls and warrant protection by the state, even though the girls may appear to consent in order to appease the family and community. But Raday does not distinguish between the harm inflicted by practices such as FGM, which is a direct physical harm that is not reversible and primarily against a child and that of face veiling, which is not a form of physical harm and a Muslim wearer of the veil can decide not to wear the veil at will.

As for those women who are forced by family members, Raday does not point to any empirical evidence that demonstrates that such coercion is a major issue in European states, yet on the issue of those who veil voluntarily, she points out that the consent argument is not empirically persuasive. This view is an emulation of the court’s view, which disregarded the empirical studies involving full face veiling in France by the Open Society Foundation,⁹⁹⁴ Moors in the Netherlands⁹⁹⁵ and Brems in Belgium.⁹⁹⁶ Raday’s other arguments based on restricted healthcare, harm to freedom of expression and restriction of mobility through loss of field of

⁹⁹¹ Ibid

⁹⁹² McGoldrick, ‘Extreme Religious Dress; Perspectives on Veiling Controversies’, supra (n 859) 425

⁹⁹³ Brems, *The Experiences of Face Veil Wearers in Europe and the Law*, supra (n 573)

⁹⁹⁴ Foundations <<http://www.opensocietyfoundations.org/reports/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france>> accessed 20 January 2014

⁹⁹⁵ <http://www.e-quality.nl/assets/e-quality/dossiers/Moslimas/Onderzoek520Gezichtssluiers%20draagsters%20debatten.pdf> cited in the written submission

⁹⁹⁶ Eva Brems and others, *The Belgian ‘Burqa Ban’ Confronted with Insider Realities* (Eva Brems ed, Cambridge University Press 2014)

vision are weak arguments. Dress itself can be a form of expression and an assertion of one's identity; punks, skinheads and Goths all being examples of those who use dress as a form of self-expression.⁹⁹⁷ Therefore to say veiling is harmful to freedom of expression is an oxymoron.

A veiled woman requesting a female doctor is not an unusual demand, of course resource permitting and it is not unusual when compared to gendered searches carried out for example at police stations in the UK which are stipulated in law.⁹⁹⁸ Furthermore, the loss of field of vision argument has been shown to be a weak one by research carried out by Pearce, Walsh and Dutton to ascertain whether face veil wearers' visual field was adequate to satisfy European driving standards. According to them women who wore the face veil in the scientific tests, all achieved a visual field that satisfied the UK and European driving standards.⁹⁹⁹ Of course it has to be acknowledged that there may be certain types of burqas with slits over the eyes that can affect the field of vision. Raday also refers to the 'choice of a handful of women in democratic countries who wear the burkah is perhaps an ethnic and religious identification symbol but it is also a symbol of identification with women's oppression'. Indeed she is referring to regimes in Saudi Arabia, Iran and Afghanistan but the oppression against those women in such regimes cannot be used as a justification of banning veiling in Europe, where women do not have veiling imposed by the state and forms an element of free choice, thus there is no comparative.

The ECtHR has not always taken a problematic stance against those who wear Religious clothing. In *Ahmet Arslan and others v. Turkey*,¹⁰⁰⁰ the court held that religious clothing such as hijab can be worn in public spaces as a right to freedom of religion. Furthermore the court acknowledged in *S.A.S.* that since some women veil through choice, the practice of veiling cannot be deemed contrary to gender inequality. But the ECtHR in *S.A.S.* appears to have gone against the reasoning it adopted in *Arslan*, which concerned 127 Turkish Nationals who belonged to a religious group and met in Ankara to attend a religious ceremony at Kocatepe mosque. The group walked around the streets wearing religious clothing that was distinctive and made up of a turban, baggy trousers, a tunic and carried sticks. They were arrested under anti-terrorism laws but then appeared before the State Security Court wearing their dress and

⁹⁹⁷ Milly Williamson, 'Vampires and Goths: Fandom, Gender and Cult Dress' in William J.F Keenan (ed), *Dress to Impress: Looking the Part* (Berg 2001)

⁹⁹⁸ For example S54(9) of the Police and Criminal Evidence Act 1984 stipulates that the constable carrying out the search shall be the same sex as the person searched

⁹⁹⁹ E Pearce, G Walsh and GN Dutton, 'Does the Niqab (Veil) Wearer Satisfy the Minimal Visual Field for Driving' (2008) 28 *Ophthalmic and Physiological Optics* 310

¹⁰⁰⁰ *Ahmet Arslan and Others v. Turkey*, supra (n 769)

were subsequently charged and convicted with wearing religious headwear and religious garments in public contrary to Turkish law. The group brought an action under Article 9 which the ECtHR heard. The court held that the group were punished for wearing particular dress in public areas that were open to everyone and the case could be distinguished from other cases of wearing religious dress in public establishments where the requirement of religious neutrality might outweigh the right to manifest one's religion. The court further held that in this case there was no evidence of a threat being posed by the group or any involvement in attempts at proselytising by putting undue pressure on any passers-by and thus the necessity of the restriction had not been convincingly established by Turkey.

There are similarities between *Arslan* and *S.A.S.* the ECtHR was aware of, which is why it expressly distinguished it on the facts. However, the court distinguished the case on the grounds that the concealment of the face was only relevant in the present case and by doing so in a 'far-fetched way, the ECtHR happily accepted the new principle of living together'.¹⁰⁰¹ Although it is worth questioning if the real distinguishing feature in *Ahmet Arslan* was that the applicants were all men wearing religious clothing, whilst the *S.A.S.* case concerns women? According to Keenan, extending prohibitions on veiling from schools and against teachers to ordinary citizens was 'going too far'. He correctly questions the likelihood of a French citizen coming across a burqa clad woman, with whom communication and socialising was so badly needed, that the notion of 'living together' would suffer. And further questions, if political questions could be solved by law, whether on part of the state or the individual?¹⁰⁰² And there are those who wonder whether banning the hijab would be next?¹⁰⁰³

In respect of France's argument that veiling is an attack on the human dignity of others, the court held that no matter how essential the requirement of such respect, a blanket ban cannot be justified:

The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy.

¹⁰⁰¹ Bernard Keenan, 'S.A.S. v France - the French Principle of "Living Together" and the Limits of Individual Human Rights' (*The London School of Economics and Political Science*, 2014) <<http://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/>> accessed 6 August 2014

¹⁰⁰² Ibid

¹⁰⁰³ Frank Kranmer, 'France and the Burqa Ban - are Hijabs Next?' (*Law & Religion UK*, 2013) <<http://www.lawandreligionuk.com/2013/08/21/france-and-the-burqa-ban-are-hijabs-next/>> accessed 15 August 2014

It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body. Moreover, it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.¹⁰⁰⁴

Although the court appears to pay heed to the subjective intentions of women who veil, it raises questions about the objective notions of dignity. For example the practice of 'dwarf tossing' can be considered by the wider society as undignifying for the dwarf, yet subjectively the dwarf may find that the practice would be more dignifying than being unemployed.¹⁰⁰⁵ In terms of veiling being contrary to the concept of dignity and equality the court was of the view that where the woman veils through her own choice, then the gender equality argument cannot be invoked to restrain that choice. However the court here has taken a simplistic approach to dignity here. If the example of FGM is taken, then just because a woman consents to the practice does not mean that it turns what would be an indignant act to one that is dignified. To suggest that voluntary choice bars any engagement of restrictions based on gender equality would lead to such protections devoid of meaning.

The margin of appreciation and proportionality in *S.A.S. v. France*

In reviewing the European consensus on banning full face coverings in public spaces, the court found that there was no consensus against banning of the burqa or face veils and that the bans had been the subject of discussions in many European states. The court's reasoning here is questionable as other European states had not banned veiling in public spaces, which means that there was consensus on the issue; that full face veils need not be banned in public spaces. The ECtHR put forward an unconvincing finding of European consensus; that bans had been discussed in several European states.¹⁰⁰⁶ Indeed debates about prospective laws common to European states are regular occurrences and as demonstrated in part one of this thesis, there are wide and controversial debates about the meaning of the Muslim veil and whether it should be prohibited, but to hold that such debates indicate consensus on the veil's prohibition is illogical and an incorrect inference drawn by the court to reach a desired conclusion for the French government.

¹⁰⁰⁴ *S.A.S. v. France [GC]*, supra (n 29) para 120

¹⁰⁰⁵ *Manuel Wackenheim v. France*, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002)

¹⁰⁰⁶ *S.A.S. v. France [GC]*, supra (n 29) para 156

As the court was faced with such a fundamental right being restricted with serious consequences for Muslim women's freedom of choice in dressing the way they want to and how rest of society who disagrees with their choice may treat them, it was expected to engage in a detailed analysis of the legitimate aim pursued by France. This is especially so, considering the court by its own volition stated that 'in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation'.¹⁰⁰⁷ But that detailed examination was absent and instead of offering a reasoned analysis, the court had effectively offered reasons why the judgement in this case should have been the inverse of the ultimate decision. The court had effectively contradicted itself, as on the one hand it was suggesting a closer scrutiny, yet on the other it afforded France a wide margin of appreciation.

The ECtHR reasoned that because the law did not target wearers of the Islamic veil specifically, the measures were proportionate to the aim pursued, but the court avoided the consideration that France had sought the advice of its Conseil d'état on whether banning the veil would be contrary to its Constitution and breach the ECHR. The French government seeking such an opinion shows that the intent of the law was to focus on veiling, even though the law is drafted in linguistic terms to appear neutral prohibiting the concealment of the face. The legislative history leading to the conception of the law on concealment of the face was highlighted by the court, making it evident that the aim was to focus on combatting the Muslim veil, yet there still appears to be an attempt at justifying the neutrality of the law. The court refers to the ban mainly affecting Muslim women and finds it significant that it is not based on any religious connotations of the veil, but the mere fact that veils conceal the face and are primarily worn for religious reasons shows the contradiction.¹⁰⁰⁸ This is a weak argument as the practical effect on women who veil is the same, irrespective of whether the law has religious connotations or neutral and for all intents and purposes the general law was phrased neutrally to ensure the effect by the French government, rather than it being seen as a law that just targeted veiled women. This was a missed opportunity for the court to engage in a discussion of the multiple meanings of the veil and the difficulty of distinguishing a religious veil from one that is worn for any other purpose.

It is rather surprising that as part of the court's assessment of proportionality it took into account what was termed sanctions 'provided for by the Law's drafters are among the lightest

¹⁰⁰⁷ Ibid para 122

¹⁰⁰⁸ Ibid para 151

that could be envisaged, because they consist of a fine at the rate applying to second-class petty offences (currently 150 euros maximum), with the possibility for the court to impose in addition to or instead of the fine, an obligation to follow a citizenship course.¹⁰⁰⁹ Such comments are difficult to defend even if someone is convicted for a single event, especially since the criminal law is invoked against Muslim women for mere compliance with their religious beliefs in the absence of any harm threatened by the veil on others and especially since the court itself realises that ‘The idea of being prosecuted for concealing one’s face in a public place is traumatising for women who have chosen to wear the full-face veil for reasons related to their beliefs’.¹⁰¹⁰ Those who feel religiously obligated to wear the veil would no doubt incur cumulative penalties and in any event, the court’s argument has patronising undertones as it should not matter what the penalty is, if the ban breaches a woman’s right, then even a token penalty cannot possibly be a reason to legitimise it.

In holding the French measure proportional the court seems at dissonance with its own jurisprudence that makes it clear that, not only must there be a pressing social need,¹⁰¹¹ but the interference must be proportional to the grounds put forward by a state, which must be interpreted narrowly.¹⁰¹² This means the ECtHR imposes an additional requirement that the measure chosen by the state must exert the least amount of interference¹⁰¹³ and the balancing approach suggested by the dissenting judges in *Francesco Sessa v. Italy*¹⁰¹⁴ is useful to highlight this. In the case a Jewish Lawyer brought an action under Article 9 claim when an Italian Court refused to adjourn a case so it does not coincide with Yom Kippur and Sukkot Jewish holidays. Although his claim was dismissed, the dissenting judges Tulkens, Popovic and Keller were of the opinion that the interference was not the least restrictive, as the lawyer had given the court ample notice of the holidays and it would not have caused an administrative burden and therefore would have been ‘a small price to be paid, in order to ensure respect for freedom of religion in a multi-cultural society’.¹⁰¹⁵ However this principle appeared to be absent from the court’s reasoning and it was perfectly possible for France to impose limitations on those who veil to areas only where identification of the face is essential. Although the court used this

¹⁰⁰⁹ Ibid para 152

¹⁰¹⁰ Ibid

¹⁰¹¹ *Silver and Others v. United Kingdom* App no's 5947/72 6205/73 7052/75 7061/75 7107/75 7113/75 7136/75, (25 March 1983)

¹⁰¹² *Klass v. Germany* App no 5029/71, (6 September 1978)

¹⁰¹³ *Witold Litwa v. Poland* App no 26629/95, (4 April 2000)

¹⁰¹⁴ *Francesco Sessa v. Italy* App no 28790/08, (3 April 2012)

¹⁰¹⁵ Ibid para 13

argument for the security and identification grounds, it seemed to have ignored it when the issue was one of being veiled in public space.

The court acknowledges that the number of wearers of the full face veil was around 1900 at the end of 2009 of which 270 were in French administered areas, representing a small proportion of about sixty five million and to the numbers of Muslims living in France.¹⁰¹⁶ Thus the prospect of the ordinary person coming across someone veiled and the need for direct contact is limited, and there is no evidence provided by the French authorities that veiled women posed any threat or danger. In such circumstances the requirement of a pressing social need is not justified, especially since the negative impact of the measure on those women who feel it is a religious duty to veil is confinement to private spaces imposing a limitation on their choices and the freedom from external constraint, which is the same freedom Muslim veiled women are considered to be lacking by those who find the the practice oppressive as discussed in part one of the thesis. The resultant loss to the Muslim women who veil is the loss of all the opportunities available to others who have access to public places, which in effect is a form of state seclusion from public spaces. Furthermore the court noted that there were a large number of organisations national and international, who were of the opinion that a blanket ban would be disproportionate. Although the court is not legally bound by such opinions, but for the purposes of local and international consensus playing a part in the width of the margin of appreciation, it should have been a factor taken into account.

It is troubling that the court found that whether or not the veil should be permitted was a choice of society¹⁰¹⁷ and its prohibition would make living easier for the French society. But the French government or the court does not state how the majority chooses? Is there a criterion? How does France or the court know it was a choice of the French society? Was it just a political choice or a choice of the French people? And in any event, how is it that one French citizen can choose what another French citizen can wear or not? This begs the question that if French society chooses that Muslim men were not allowed to wear beards, would that be acceptable? These questions are clearly those that needed to be probed by the court when determining the necessity of the measure just as the court in *Vajnai* has reminded:

¹⁰¹⁶ The exact number of Muslims is difficult to quantify as France does not gather any census based on religion

¹⁰¹⁷ *S.A.S. v. France [GC]*, supra (n29) para 153

A legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto.¹⁰¹⁸

The S.A.S. judgement failed to engage in an adequate proportionality analysis by its failure of closer scrutiny just as in *Sahin*,¹⁰¹⁹ despite the court suggesting that it was an important requirement in order to prevent an abuse of rights by the French law ‘In view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation’.¹⁰²⁰ The proportionality approach by the court in S.A.S. is just as envisaged by Howard, who predicted that because the issue is politically charged, the court in S.A.S. would not engage in the detail and analysis that was required as to whether the ban was necessary in a democratic society and it would not engage in a detailed proportionality assessment. According to her and rightly so ‘The ECtHR should not abdicate responsibility for the protection of the freedom to manifest one’s religion in this manner, but should, instead, follow *Arslan v Turkey* and apply a rigorous justification and proportionality test’.¹⁰²¹ However the court has done precisely what she expected, but may not have wanted.

The concept of ‘living together’ as a legitimate aim under Article 9

France argued that the law prohibiting the concealment of faces pursued two legitimate aims: public safety and respect for the minimum set of values of an open and democratic society. The French government argued that respect for minimum requirements of life in society could be linked to the ‘protection of the rights and freedoms of others’ within the meaning of the second paragraph of Articles 8 and 9 of the Convention.¹⁰²² The government added that concealing one’s face in public leads to the breaking up of social ties and expresses a rejection of ‘le vivre ensemble’ the principle of ‘living together’. And that exposure of the face has a significant function when humans interact over and above other parts of the body, and the face identifies the uniqueness of an individual and represents the collective as well as otherness. It is worthy of noting that the French Council of State had in the past taken a

¹⁰¹⁸ *Vajnai v. Hungary* App no 33629/06, (8 July 2008) paras 55, 57

¹⁰¹⁹ *Leyla Sahin v. Turkey* [GC], supra (n 28)

¹⁰²⁰ *S.A.S. v. France* [GC], supra (n 29) para 122

¹⁰²¹ Erica Howard, ‘Banning Niqab in Public Spaces’ (*Blog of the European Journal of International Law*, 2013) <<http://www.ejiltalk.org/banning-niqabs-in-public-spaces/>> accessed 17 July 2014

¹⁰²² *S.A.S. v. France* [GC], supra (n 29) para 116

diametrically opposed position on the same issue. Shadid and Van Koningsveld note that although the Council had said that France had the right to legislate as it deems fit, but:

To force a Muslim woman to take off her headscarf which expresses her religious conscience and her free choice, is to be considered as the severest kind of oppression of women which is contrary to the French values calling for respect for the dignity of women and their religious, human and personal freedom.¹⁰²³

Although it could be distinguished that the effect of wearing a headscarf and a face veil is different on others, albeit they are both motivated by religious belief, the effect of prohibiting either form of religious dress is the same on women. The court rejected all other arguments put forward by the French government and accepted only one; the minimum requirements of life in society.¹⁰²⁴ The court was of the opinion that this argument fell within the scope and was justified in order to 'protect the rights and freedoms of others' as required by Article 8 and 9. The court accepted France's argument that the prohibition was targeted to safeguard the minimum requirement of civility that is required for social interaction. This was on the grounds that it was within the remit of France to secure conditions, which would foster diversity attaching particular weight on face concealment, which may impact on social interaction.¹⁰²⁵ The court went on to say that it could understand:

The view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.¹⁰²⁶

However, the court indicated that the notion of 'living together' was a flexible one and there was an element of a risk of abuse and thus it needed to engage in a careful inquiry into the

¹⁰²³ Shadid and Koningsveld, *supra* (n 932) 40

¹⁰²⁴ *S.A.S. v. France [GC]*, *supra* (n 29) para 141

¹⁰²⁵ *Ibid* para 141

¹⁰²⁶ *Ibid* para 122

necessity of the limitation. But despite recognising the risk of abuse of such an abstract principle, the court failed to heed to its own concern by allowing France a wide margin of appreciation. Disappointingly, the court simply reviewed previous case law under Article 9, without any discussion of what ‘living together’ means, concluding that the French authorities had attached great importance to it, which was apparent from the explanatory memorandum accompanying the law in its legislative stages. The greatest concern in the judgement has been the court’s acknowledgement of this abstract notion of ‘living together’ which in the absence of the prescribed legitimate aims contained in Article 9(2) was relied upon by the state. On the one hand the court reiterates that:

The enumeration of the exceptions to the individual’s freedom to manifest his or her religion or beliefs, as listed in Article 9(2), is exhaustive and that their definition is restrictive... For it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision...¹⁰²⁷

Yet on the other hand the majority in the court concedes to the state’s claim that living together is relevant to the recognised aim of ‘protecting the rights and freedoms of others’. It is this lack of correlation which makes the reasoning and the justifications provided in the judgement questionable. It is thus no surprise that the two dissenters, judge Nussberger of Germany and judge Jaderblom of Sweden express in blunt terms their disagreement with the forced fitting of this new and novel legitimate aim. They were of the opinion that concrete Convention rights were being sacrificed to abstract principles and doubted that the French government pursued a legitimate aim and in any case, such a ban affecting women’s right to cultural and religious identity was not necessary in a democratic society.¹⁰²⁸ The dissenting judges disagreed that a legitimate aim in ensuring living together through the observance of the minimum requirements of life in society could amount to rights and freedoms of others.¹⁰²⁹ They based their argument on the lack of clarity in the ECtHR jurisprudence as to the coverage of rights and freedoms of others outside the Convention. Therefore the ‘very general’ concept of living together cannot be incorporated directly and in any event they stated it was ‘far-fetched and vague’.¹⁰³⁰

¹⁰²⁷ *S.A.S. v. France [GC]*, supra (n 29) para 113

¹⁰²⁸ *Ibid* dissenting judgement paras 1-2

¹⁰²⁹ *Ibid* dissenting judgement para 4

¹⁰³⁰ *Ibid* dissenting judgement para 5

Justifications for the notion of 'living together'

The court makes statements about 'living together' and the reasons the full face veil is incompatible with the notion, but nowhere does the court or the French government actually state what the notion means. The court does not go beyond mere statements declaring veiling to be incompatible with the concept, with no real explanation of why that may be so or what these conditions comprise. From a legal perspective this is not only a surprise but unacceptable, considering it is being used to justify a limitation to a fundamental freedom that could have far reaching effects in signatory states to the ECHR where Muslim communities are established. The French constitutional court when considering an application to have the French law annulled said that the French government 'sought to defend a societal model where the individual took precedence over his philosophical, cultural or religious ties, with a view to fostering integration for all'¹⁰³¹ and that the individuality of every subject was inconceivable without visibility of the face, which was fundamental in a democratic society. Accordingly the French government was entitled to adopt the view that the 'creation of human relationships' necessary for living together would be rendered impossible by veiling in the public sphere, leading to a loss of individuality and therefore met the pressing social need requirement.¹⁰³² But this reasoning of the French constitutional court relied upon by the S.A.S. court is problematic as it suggests that visibility is a pre-requisite of individuality, when clearly this cannot be the case, as that would mean that someone in contact with a blind person or people who are unable to communicate face to face would have no individuality. Additionally the reference to the impossibility of creating human relationships, which is premised on being in the public sphere, is a weak argument as that excludes the possibility of such relationships being formed in the private sphere, thus rendering the impossibility argument to a possibility one at the most.

The individuality perspective is also not free from flaws, since the security concerns are already dismissed and even if it is argued in the context of personal identity, then the removal of the veil that results in Muslim women being unveiled in public, but veiled in the private sphere, defeats that aim. This then leaves the issue surrounding the role that visibility of the face plays in social interaction, which according to the French government has the effect of breaking social ties if the face is concealed and would amount to a manifestation of the refusal to live together.¹⁰³³ But this is also problematic as all the state does is assert the incompatibility of veiling and living together, the court nor the government explain with any precision what living

¹⁰³¹ *S.A.S. v. France [GC]*, supra (n 29) para 42

¹⁰³² *Ibid*

¹⁰³³ *Ibid* para 82

together entails or how the incompatibility is justified. Instead the court makes a departure from the earlier arguments related to individuality and creation of human relationships, attempting to justify the notion of 'living together' by stating that it is amenable to the view that those others in public spaces:

may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.¹⁰³⁴

This rationale by the court takes a totally different turn since prohibition of veiling is now simply being justified by how some French people may not agree or dislike veiling. From a human rights perspective, this would simply be the court deferring to a majority opinion based on a mere disliking of or the shocking effect of the veil, which is contrary to the courts own jurisprudence where in *Handyside* the court said that the Convention protects not only 'ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population' and that there would be no democracy without pluralism, tolerance and broadmindedness.¹⁰³⁵ Thus to prohibit a practice on the basis that it leads to a dislike or disagreement by a majority has neither a legal basis, nor demonstrates tolerance or broadmindedness of the majority society to religious practices of a minority, thus fracturing the hallmarks of a democratic society and rendering human rights for Muslim women who veil in Europe to be a hollow guarantee. The preference of the majority leads to switching the meaning of the veil from a religious to being a symbol of intolerance of others who don't veil as intimated in *Sahin*¹⁰³⁶ and *Dahlab*¹⁰³⁷ and to one that is intolerated by the others. To use such an approach to prohibit the veil is incorrect as stressed by Baroness Hale in the UK *Shabina Begum* case, reminding that mere disliking or discomfort is not a strong reason for legal prohibitions on religious symbols:

If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her...

¹⁰³⁴ Ibid para 122

¹⁰³⁵ *Handyside v. United Kingdom*, supra (n 630) para 49

¹⁰³⁶ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

¹⁰³⁷ *Dahlab v. Switzerland*, supra (n 27)

Likewise, the sight of a woman in full purdah may offend some people, and especially those western feminists who believe that it is a symbol of her oppression, but that could not be a good reason for prohibiting her from wearing it.¹⁰³⁸

In respect of allowing the voice of the majority to prevail over the minority rights the ECtHR jurisprudence has reminded that:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of dominant position.¹⁰³⁹

Yet despite such strong judicial pronouncements in the past, the court in *S.A.S.* still attempts to justify the principle of living together by adopting the majority view with an exaggerated importance attached to the principle of interaction, instead of a balanced view of tolerance and broadmindedness in respect of values and practices of all communities living together, which is required in plural societies:

The respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of intolerance and broadmindedness without which there is no democratic society.¹⁰⁴⁰

Such justifications are surprising, since it is the prohibition on veiling that acts as a limiter of pluralism and the French government can be perceived as fostering the intolerance of religious practices of minorities, which certainly does not constitute broadmindedness of French society if it is contingent on visibility of faces without veils.

Ultimately the Grand Chamber and the French government failed to provide with any clarity what the conditions of living together comprise, and the explanations provided are simply not congruent with the justifications provided, signalling a failure of the court to act as the guardian of the applicant's Article 9 rights. The Convention requires consistency in the application of the principles, particularly the stated legitimate aims under Article 9(2), which is

¹⁰³⁸ *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15 para 96

¹⁰³⁹ *Young, James and Webster v. United Kingdom*, supra (n 760) para 63

¹⁰⁴⁰ *S.A.S. v. France [GC]*, supra (n 29) para 153

lacking in the case. This is due to France and the S.A.S. court force fitting the 'living together' principle with the legitimate aim of protecting the 'rights and freedoms of others' in order to justify the prohibition on the Muslim veil in the absence of consistency, certainty and transparency of reasoning behind the principles invoked.

Empowering the majority French identity

The terms empowerment or control of identities has been borrowed from Marshall's recent work on the S.A.S. judgement and how that has and can impact on individual rights from an identity perspective.¹⁰⁴¹ The French state did not specifically raise secularism as a ground for prohibiting the veil; however such a motivation cannot be discounted even though it would not withstand any legal justification. Article 1 of the Constitution of 4 October 1958 makes it implicit that the French concept of citizenship and belonging to the state is the priority over other entities such as religion, race, culture or any form of communitarianism. This assimilation and political unity leads to the consequence that those who are not of French heritage have to adopt the cultural norms of the French society and become assimilated to French values:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis. Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.¹⁰⁴²

The requirement here from people of different backgrounds from the majority society in France is that they must join the homogenous French unity and the visibility of cultural or religious practice in the public sphere must give way to the idea that all French citizens are equal and the same. It is this national French identity that must prevail over individual differences such as religious and cultural identities. This requirement of sameness causes difficulties to those who wish to wear the full face veil in France and is the probable reason why the French report cited in S.A.S. finds it 'a practice at odds with the values of the Republic', as expressed in the maxim 'liberty, equality, fraternity' and that 'the full-face veil represented a denial of fraternity, constituting the negation of contact with others and a

¹⁰⁴¹ Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities', supra (n 262)

¹⁰⁴² 'Constitution of 4 October 1958' (*Conseil Constitutionnel*) <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#Title1>> accessed 3 March 2015

flagrant infringement of the French principle of living together'.¹⁰⁴³ This view and the court's reference to the restriction on full face veiling being a choice for the French society¹⁰⁴⁴ is consistent with the findings of a Global Attitudes survey carried out in twenty two different countries on banning of the Islamic veil which showed that 82% of French people approve of a ban on Muslim women wearing full veils in public, including schools, hospitals and government offices, while just 17% disapprove.¹⁰⁴⁵ Even though the dissenting judges described the notion of 'living together' as a 'far-fetched and vague',¹⁰⁴⁶ the court still deferred to France a wide margin of appreciation from which it is deducible that it was in light of the majority's preference of the collective French identity and concept of citizenship.

The French Parliament with a legitimate political majority via informed discussions, and having sought advice and opinions from national and international bodies, even though it was not heeded to¹⁰⁴⁷ reached a conclusion that the restriction on full face veiling was necessary in France. This required a balancing act between the fundamental rights of those who wear the full face veil and their restrictions considered necessary a democratic society by the French government. The balancing of the rights has to be inevitably in favour of one of the parties even though in some cases it means a restriction of minority freedoms, but providing the state has acted and engaged in that democratic process, then majority political opinion cannot always be rejected outright. Protecting fundamental rights of minority citizens is an aim of human rights but that does not mean that they must always prevail over the majority, otherwise practices such as polygamy, FGM and some types of participation in the sex industry would never be restricted in Europe. However this has to be subject to the proviso that such interference with the rights of minorities and the vulnerable would disclose a clear legal justification articulated with a genuine necessity, unlike the *S.A.S.* judgement.

These arguments can add force to France's perspective but one of the major flaws in the *S.A.S.* legal judgement in this respect is the concept of 'living together' through 'the observance of the minimum requirements of life in society' being classified as a legitimate limitation imposed 'for the protection of the rights and freedoms of others' as contained in Article 9(2). There is a lack of clarity as to what amounts to the 'rights and freedoms' of others,¹⁰⁴⁸ with the court not

¹⁰⁴³ *S.A.S. v. France [GC]*, supra (n 29) para 17

¹⁰⁴⁴ *Ibid* para 153

¹⁰⁴⁵ 'Widespread Support For Banning Full Islamic Veil in Western Europe' (*Pew Research Centre*, 2010) <<http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/>> accessed 5 March 2015

¹⁰⁴⁶ *S.A.S. v. France [GC]*, supra (n 29) dissenting judgement para 5

¹⁰⁴⁷ *Ibid* paras 15-27 and para 38

¹⁰⁴⁸ *S.A.S. v. France [GC]*, supra (n 29) dissenting judgement para 5

only applying such a limitation clause to cases where fundamental convention rights of others have been affected,¹⁰⁴⁹ but has also utilised the category with respect to prevention of commercial advantage which is not a fundamental right in the Convention sense.¹⁰⁵⁰ The court and the French state failed to put forward the precise rights of others that were under attack by the concealment of the face and exactly whose rights were attacked and how? There is a total lack of analysis by the court of the precise rights of others affected. The use of the term ‘the observance of the minimum requirements of life in society’ just suggests an interest of the majority French society, which is a dislike or an intolerance of the veil due to its difference from the majority’s appearance, as opposed to a right. A better view is articulated by the dissenting judges commenting that even if the veil was a barrier to communication or integration there is no right ‘not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European life-style’¹⁰⁵¹ and furthermore:

It can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will. Otherwise such a right would have to be accompanied by a corresponding obligation. This would be incompatible with the spirit of the Convention. While communication is admittedly essential for life in society, 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.¹⁰⁵²

Despite such clear views of the dissenting judges in *S.A.S.*, the *Barthold*¹⁰⁵³ case, which protected a commercial interest, suggests that interests of others can be taken into account but a greater problem in the veiling case is the lack of specificity as to exactly who the others are? Is the whole of French society affected? Is it children or adults or both? Is it men or women or both? Do the others include Muslims? Are Muslim women who do not veil included? All of these categories to some extent or other may well have their interests affected by veiled women, but whether and which of their fundamental rights or freedoms are affected, as required by the Article 9(2) clause is a major omission on part of the court and the French government, and certainly reminiscent of the *Sahin*¹⁰⁵⁴ judgment on the same issue.

¹⁰⁴⁹ *Otto-Preminger-Institut v. Austria*, supra (n 679)

¹⁰⁵⁰ *Barthold v. Germany*, supra (n 747)

¹⁰⁵¹ *S.A.S. v. France [GC]*, supra (n 29) dissenting judgement para 7

¹⁰⁵² *Ibid* dissenting judgement para 8

¹⁰⁵³ *Barthold v. Germany*, supra (n 747)

¹⁰⁵⁴ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

Such lapses in the judgment of a case expected to counteract the lack of explanation in the reasoning of *Sahin*¹⁰⁵⁵ can only play a part in furtherance of doubts as to the legal status of religious symbols such as the face veil in public spaces of Europe.

Controlling the identity and personalities of women who veil

Muslim women's identity through the wearing of the veil is being perceived as different to those who form the majority society in European states, just as in the French case where some Muslim women's form of dress, which inhibits social interaction when accompanied by the veil is considered as not conforming to that of the majority and contrary to requirement of living together. The use of dress as a form of expression of our identity or personality is not a new concept and certainly not confined to the religious only. Through history and in current times many youth subcultures have utilised forms of dress to project their social identities and personalities via appearance, which may not have been in conformity with the majority society, but nevertheless recognised and tolerated as a matter of individual choice in a liberal society. Such recognition is gained through the existence of human rights that uphold the right to freedom of expression, which has further developed into recognition of identity and personality via the ECtHR interpretation of Article 8 of the ECHR leading to an empowerment of identities.¹⁰⁵⁶ However, the Grand chamber's interpretation of the concept of 'living together' in *S.A.S.*¹⁰⁵⁷ questions whether Muslim women's right to appear how they want to and their identity or personality is accorded the same recognition as the majority society, which seems too have been empowered, whilst that of Muslim women who choose to veil being controlled.

Human rights are about choices individuals make and that includes Muslim women's choice of dress, for which national policies and the law should provide an environment, which fosters such free and autonomous choices. This in turn would provide conditions that enable the formation, maintenance and the variation of their identities, just like the applicant in *S.A.S.*¹⁰⁵⁸ stated that she wore the veil in public and in private and would not wear it during visits to the doctor and socialising with friends in public. She chose to wear the veil intermittently depending on whether she was feeling spiritual but wore it during religious events and as a means of religious, personal or cultural expression without any intent to annoy anyone.¹⁰⁵⁹ But

¹⁰⁵⁵ Ibid

¹⁰⁵⁶ Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities', supra (n 262) 378

¹⁰⁵⁷ *S.A.S. v. France [GC]*, supra (n 29)

¹⁰⁵⁸ Ibid

¹⁰⁵⁹ Ibid

such choices for those who want to wear the veil are not free from interference and Marshall reminds that human rights law stipulates who is included or excluded from its protection and in this process the recognition or misrecognition of identities takes place.¹⁰⁶⁰ The court's acceptance of the prohibition of the veil because it fails to respect the conditions of 'living together', which although not defined or elaborated on by the court, is based on the choice of the majority society. Such an interpretation has the effect of limiting if not an outright rejection of the freedom of expression and the recognition of individual identities whilst empowering majority identities.

According to Marshall the way human rights law treats people's identities has an impact on their perception of themselves as 'individuals and collectively' and such legal and political treatment pushing people in particular ways of living is part of who people are, which can 'empower or constrain' them and their 'identities and personalities' leading to a priming of particular types of identity.¹⁰⁶¹ She adds that:

In particular, when people are socially powerless, their freedom, starting with the imagination in their own heads-unfettered freedom of conscience-can lead to empowerment. Human rights law, like all law, can play a role in how those 'heads' develop and become our own, through the interpretation it gives to explicit legal provisions.¹⁰⁶²

Thus interpretations of human rights law can play a role in empowering women who veil by setting the enabling conditions for the free creation, maintenance and variation of their identities instead of prohibiting them from wearing the veil and rendering them powerless socially; in public spaces. Indeed such empowerment can also be enabled by prohibiting the veil in public spaces through interpretations of the law when the issue concerns the veil that has not been freely chosen and has been forced upon them. This mode of empowerment would allow the Muslim women's personhood to be developed without her conscience being influenced, leading to greater freedom to decide whether or not to veil in public spaces. However such reasons were not canvassed by the court in *S.A.S.* explicitly and if anything, the court recognised the validity of the choice to wear the veil by departing from the *Dahlab*¹⁰⁶³

¹⁰⁶⁰ Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities', supra (n 262)

378

¹⁰⁶¹ Ibid

¹⁰⁶² Ibid 379

¹⁰⁶³ *Dahlab v. Switzerland*, supra (n 27)

and *Sahin*¹⁰⁶⁴ position where the veil was interpreted as being a symbol of gender inequality. Empowerment or liberation within the feminist framework for gender equality was used as a justification by France when it removed the hijab worn by schoolgirls using the force of law.¹⁰⁶⁵ This led to the perception of the French government acting as the enforcers of equality who remove oppressive practices against young Muslim girls, which would allow them to exercise their freedom of choice without patriarchal constraint in an educational setting. The French government hoped that having enjoyed that autonomy without the hijab, they would enter employment and public spaces with their head or face uncovered. However if the same young women having matured into adults decide to veil through free choice in public spaces, then interpretations of human rights law such as the ‘living together’ principle in the *S.A.S.*¹⁰⁶⁶ case, which constrains Muslim women’s ability or desire to form an identity by wearing the veil can lead to their misrecognition as persons and contributes to rendering them ‘powerless and excluded’.¹⁰⁶⁷ Such controls over Muslim women’s identity contradicts France’s aim to empower them, as what use is the fostering of free choices in schools to form identities if they are not going to be recognised during adulthood in public spaces? The controlling of identities according to Marshall’s interpretation is out of tune with the respect for freedom and dignity envisaged by the ECHR.¹⁰⁶⁸ The ECtHR has developed jurisprudence under Article 8 that recognises individual identity and autonomy in cases involving many aspects of private and intimate life including sexual orientation¹⁰⁶⁹ gender recognition¹⁰⁷⁰ and in *Gough v. United Kingdom* the court even considered an Article 8 identity claim for the applicant’s appearance with a total lack of clothing asserting that ‘The concept of “private life” is broad in scope and not susceptible of exhaustive definition’.¹⁰⁷¹ Similarly the GC in *S.A.S.* also affirmed the application of Article 8 to the desired appearances through personal choices.¹⁰⁷²

Another interpretation of the ‘living together’ notion offered by the French government as noted by Marshall is based on the use of dignity as a form of constraint where the prohibition of the veil would safeguard the dignity of ‘society as a whole, of women as a group and of the

¹⁰⁶⁴ *Leyla Sahin v. Turkey* [GC], supra (n 28)

¹⁰⁶⁵ Law 2004-228 of 15 March 2004

¹⁰⁶⁶ *S.A.S. v. France* [GC], supra (n 29)

¹⁰⁶⁷ Marshall, ‘S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities’, supra (n 262)

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¹⁰⁶⁸ *Ibid* 379

¹⁰⁶⁹ *Dudgeon v. United Kingdom* App no 7525/76, (22 October 1981)

¹⁰⁷⁰ *Christine Goodwin v. United Kingdom* [GC] App no 28957/95, (11 July 2002)

¹⁰⁷¹ *Gough v. United Kingdom* App no 49327/11 (28 October 2014) para 182

¹⁰⁷² *S.A.S. v. France* [GC], supra (n 29) para 107

individual woman who wears it'.¹⁰⁷³ She notes that this constraining form of dignity imposes a duty on individuals to protect their own dignity through a limitation of free action and can be a legitimate aim under the limitation clauses of Articles 8-10.¹⁰⁷⁴ This constraining form of dignity could be considered in cases of FGM and women in the pornography industry, however in the case of the Muslim veil, the court in *S.A.S.*¹⁰⁷⁵ was of the view that the veil did not offend the dignity of others and as such a blanket ban on the veil could not be justified on such the grounds. Although it is unfortunate the court did not engage in any further analysis on this issue, it had afforded recognition to the principle that everyone should be able to live in accordance with their convictions and personal choices, especially since there is no harm inflicted on the self or others through veiling, and such a stance by the court is highly welcomed by commentators such as Marshall who is a leading proponent and developer of the principle of dignity in human rights law.¹⁰⁷⁶

Concerns surrounding the 'living together' aim

The previously unheard concept of the 'living together' aim does raise some concerns as it has the potential to water down the certainty that is required in law and an applicant's Article 9 rights. For example, it can be used to buttress future manifestations of religion by those in Europe who may wear religious head dress like the Sikh turban or the Jewish kippa. It begs the question whether any kind of behaviour could be curbed because the majority society finds it intolerable or uncomfortable and not conducive to 'living together' or indeed any other religious practice that offends or is out of tune with a majority's norms or expectations. Furthermore the court has simply not listened to the voices of women who veil, had it done so it would have realised that it is not Muslim veiled women who do not want to interact with the wider society but rather the majority society do not want to interact with them. Surprisingly the court allows restriction of religious pluralism echoed in *Kokkinakis*¹⁰⁷⁷ as being the foundation of a democratic society, in order for the French government to protect the principle of social interaction, which strangely would lead to maintenance of pluralism and a spirit of tolerance and broadmindedness in society. It is questionable how removal of pluralism can lead to pluralism, especially since those Muslim women who wish to abide by their religious beliefs would have no choice but to remain in private places. The court simply ignores

¹⁰⁷³ Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' supra (n 262) 382

¹⁰⁷⁴ Ibid

¹⁰⁷⁵ *S.A.S. v. France [GC]*, supra (n 262)

¹⁰⁷⁶ Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities', supra (n 262) 383

¹⁰⁷⁷ *Kokkinakis v. Greece*, supra (n 604) para 31

the fact that a state either tolerates religious pluralism or it doesn't. Degrees of pluralism dependent upon a state's version to satisfy the majority society that exclude veiling, or burqas, cannot be considered as tolerating a religiously pluralistic society. It is disappointing that the Grand Chamber concedes to such a paradox and ignores its own principle that when there is a conflict of values then the role of the state in such circumstances is 'not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.¹⁰⁷⁸ This is especially when the court reminds those individuals who are prevented from manifesting their religion through veiling that:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.¹⁰⁷⁹

Despite previous equitable jurisprudence from the court, in the present case the dominant position of French society who had decided that women who veil do not conform to its standards of living together was favoured by the court, with no indication of how it balanced the competing interests, of those who want to veil and those who object to the practice. Indeed the court was faced with the same dilemma over applying human rights to the veiling issue as the oppressive versus emancipatory debate and the danger of adopting polemic views or avoiding difficult issues is highlighted by Nussbaum very well:

To say that a practice endorsed by tradition is bad is to risk erring by imposing one's own way on others, who surely have their own ideas of what is right and good. To say that a practice is all right whenever local tradition endorses it as a right and good is to risk erring by withholding critical judgement where evil and oppression are surely present. To avoid the whole issue because the matter of proper judgement is so fiendishly difficult is tempting but perhaps the worst option of all.¹⁰⁸⁰

There are legitimate arguments of gender equality and dignity for those who have the practice imposed on them and it is the forced practice the majority perceive veiling as, a perception the

¹⁰⁷⁸ *Serif v. Greece*, supra (n 877) para 53

¹⁰⁷⁹ *S.A.S. v. France [GC]*, supra (n 29) para 128

¹⁰⁸⁰ Nussbaum, *Sex and Social Justice*, supra (n 365) 30

court in *Dahlab*¹⁰⁸¹ and *Sahin*¹⁰⁸² had favoured. The difficulty which the court faces and has hesitated to engage in fully is that veiling has different meanings for different women, which is further exasperated by the global contexts within which veiling takes place such as the enforced practice as in Saudi Arabia, Afghanistan and Iran that play an influential role in perceptions about the practice in Europe.

The ECtHR acknowledged ‘variability of notions of virtuousness and decency in relation to clothing’¹⁰⁸³ but fails to engage in any discussion on the multiple meanings of the veil in its analysis. It would have been an ideal opportunity for the court to extend and apply to veiling its previous reasoning on symbols that possess more than one meaning. For example as in *Vajnai v. Hungary*¹⁰⁸⁴ where the applicant wore the ‘red star’ as a symbol of the international workers movement and criminal proceedings were instituted against the applicant, for having worn a totalitarian symbol in public, a criminal offence under Hungarian law. The court held that the applicant’s rights to Article 10 had been infringed and cautioned on restricting the use of symbols which have more than one meaning, suggesting that a blanket ban may not be justified since that can restrict the use of that symbol in a context where the restriction might be unjustified:

Utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings. In such situations, the Court perceives a risk that a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be justified... and there is no satisfactory way to sever the different meanings of the incriminated symbol.¹⁰⁸⁵

It is unfortunate the utmost care was not prominent in the judgement and a discussion of the multiple meanings and contexts of veiling were never discussed by the court, despite the research provided by the third party interveners containing the voices of those who veil and their motivations for doing so. Rather the court’s version of enhanced scrutiny is simply confined to its observance that the French authorities had attached much weight to the notion of living together. And that the minimum requirement of civility necessary for social interaction, falls within the competence of the state to ensure that conditions can be secured,

¹⁰⁸¹ *Dahlab v. Switzerland*, supra (n 27)

¹⁰⁸² *Leyla Sahin v. Turkey [GC]*, supra (n 28)

¹⁰⁸³ *S.A.S. v. France [GC]* para 120

¹⁰⁸⁴ *Vajnai v. Hungary*, supra (n 1018)

¹⁰⁸⁵ *Ibid* para 51, 54

whereby individuals can live alongside each other in their diversity, with concealment of the face adversely affecting this interaction.¹⁰⁸⁶ According to Vickers and the dissenting judges, the far-fetched and vague notion of living together was one of the weakest legitimate aims relied upon by the state and the court. Vickers finds it surprising that despite the ECtHR recognising that this was a flexible notion, which should have warranted enhanced scrutiny to ensure the aim was necessary, the court still went ahead and accepted the aim as being legitimate, giving France a wide margin of appreciation holding the ban as being a proportionate measure.¹⁰⁸⁷

The use and upholding of a fluid and a slippery term like 'living together' in the ECtHR jurisprudence leaves uncertain how the rights of others may have been so seriously affected by Muslim women veiling that they warranted an outright ban on the practice? Despite the lack of clarity, two main arguments are evident from the proceedings in *S.A.S.*; veiling problematizes integration of veiled Muslim women into the majority society and the lack of transparency in communication due to face concealment.

Does prohibiting veiling in public spaces promote Integration?

The theories on Integration in the field of social sciences are multi-dimensional and in the context of veiling by a minority in a majority society, where the practice is not a norm, it can be described as a two way process. This process requires minorities to adopt the laws, values and democratic rights of the majority culture. In return, the host culture is flexible and tolerant to the retention of cultures and group identities of the minorities. Thus facilitating the influence and understanding both cultures would have on peaceful accommodation and commitment to live and let live. Banning face concealment on the grounds of it disrupting the integration process of women into the French way of life is an absolute argument, as unlike other coverings that don't conceal the face, the burqa or the face veil effaces the wearers identity and renders her isolated and segregated.¹⁰⁸⁸ As segregation is naturally opposed to integration, it is a concern for European states and this argument is recognised by Howard citing McGoldrick, who says that 'There are widespread concerns in a number of European states that significant elements of Muslim communities are not sufficiently integrated' and that some states:

¹⁰⁸⁶ *S.A.S. v. France [GC]*, supra (n 29) para 141

¹⁰⁸⁷ Vickers, 'Conform or be Confined: *S.A.S. v France*' supra (n 985)

¹⁰⁸⁸ Silvio Ferrari, 'In Praise of Pragmatism' in Alessandro Ferrari and Sabrina Pastorelli (eds), *The Burqa Affair Across Europe* (Ashgate 2013)

Have recognised that they need to take more positive measures to integrate Muslims institutionally, politically, substantively, economically and culturally. However, there is also a widely held view that Muslim communities must themselves do more to engage socially and politically and to contribute more to their integration. In this context the wearing of the headscarf – *hijab* can be viewed not only as a cultural or religious manifestation, but also as a symptomatic of a reluctance to integrate.¹⁰⁸⁹

Howard goes on to say that this segregation or ‘setting apart leads to the creation of separate communities within society which are reluctant to meet and mix with others’.¹⁰⁹⁰ Segregation does indeed lead to divided and separate communities and this is evident in a number of European states. For example, Amara gives the example of the French banlieues where Muslim veiling is dominant due to its enforcement by men from the North African community, who use violence against women to conform to strict religious codes¹⁰⁹¹ and the segregated communities have been the subject of many riots. Similarly in the United Kingdom there have been a number of riots in the Northern towns of Bradford, Oldham and Burnley where the majority and minority communities are sharply segregated. This led to Cante using the term ‘parallel lives’ to describe the white and Asian communities who had little or no contact and had developed separately, leading to little convergence of shared experiences and values.¹⁰⁹²

In Howard’s view, arguments based on integration in favour of bans on veiling could be used in places such as schools, where divergent forms of dress can divide and lead to formation of separate groups and prohibitions on veiling could promote social cohesion in schools. Her views resonate with those of Ferrari who argues that simply banning veils from public space is not acceptable, as the public sphere needs to be deconstructed into three separate entities.¹⁰⁹³ First there is a common space where people go about their everyday business like shopping, travelling and going to work. The other spaces are political space and institutional space. She argues that the rules that apply to these different spaces is different and neither are the rules

¹⁰⁸⁹ Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education*, supra (n 309) 32-33 citing McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* 19-20

¹⁰⁹⁰ Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education*, ibid 33

¹⁰⁹¹ Amara and Zappi, supra (n 485); Strieff, supra (n 540)

¹⁰⁹² Ted Cante, *Community Cohesion: A Report of the independent Review Team* ((London: Home Office), 2001)

¹⁰⁹³ Ferrari, supra (n 1088)

the same for a private subject entering these spaces; teachers and students enter the same space but their behaviour and clothing is different. According to Silvio, freedom to wear religious or cultural dress should not be restricted to common space, unless it can be shown it does concrete damage to others enjoyment of this space. She argues that the same argument should apply to political space as it must be free and plural and this guarantee of pluralism is what a democratic society is founded upon. But she asserts that in the institutional space things can be different for example in the courtroom or as in schools.

The integration argument with respect to forced unveiling is not free from weaknesses. There are those who are against the wearing of veils and burqas yet disagree on the use of the law to unveil women, for example Berlinski states strongly the oppressive effects of the burqa:

What about the women who are extorted into cloaking themselves under pressure from a culture characterized by arranged marriages and honour killings? These women are pressured to submit because others have submitted. ...These women and girls are in France, but they are not free. They are "shut out from social life and robbed of any identity," as (French president Nicolas) Sarkozy puts it, and the burqa is their moving prison, enveloping every step. It extends the republic's 750 zones urbaines sensibles, "sensitive urban areas" - Islamic enclaves over which the French state has effectively ceded sovereignty to sharia authorities.¹⁰⁹⁴

Berlinski further goes on to argue that the use of the law to unveil women is not the appropriate mechanism as the issue of veiling is:

A social problem, not a legal one. Law is the steel by which a body politic reinforces its vibrant, pre-existing mores. It is not a device for creating mores or for bringing to heel those who are at war with the body politic. ...For a dying society, though, a law, like the burqa law, is about as useful as a band-aid.¹⁰⁹⁵

Bans on veiling instead of leading to better community cohesion, can lead to those who sincerely believe it is a religious mandate to be pushed into private space in the home. This would impact negatively on the women concerned and would further drive them into segregation, as that would be the only place where they could remain free from criminality.

¹⁰⁹⁴ Claire Berlinski, 'Ban the Burqa' [2010] August 16 National Review on Line

¹⁰⁹⁵ Ibid

This could also lead to limitations on the ability of these women to pursue education, gain employment and the opportunity to interact with other members of society. The effect of this would be to reverse the original aim; to encourage coming out of seclusion and into integration. Not only does the integration argument prevent expression of the women's identity of being a Muslim, but also suggests that all those Muslim women who do not veil are better integrated into the majority society.

Prohibiting veiling in public space distorts the principle of live and let live, as the majority society do not want to give and blame the minority for refusing to live together as in the French *S.A.S.* case. Even those Muslim feminists such as Gohir who concedes that veiling is a barrier to communication questions how forced unveiling can better integrate Muslims:

I accept the veil impedes communication and integration but how is preventing a few thousand women in Europe from covering their face helping the majority of Muslims integrate? If concerns were genuine, then politicians would be attempting to tackle the real barriers to integration such as high unemployment rates and the multiple forms of discrimination experienced by the Muslims.¹⁰⁹⁶

To suggest that veiling prevents integration and contributes to the lack of community cohesion would be to suggest that non-Muslim communities such as the Sikh community in the Southall area of the UK or the Hindu community in Leicester in UK are better integrated and don't lead parallel lives. The direct link of veiling with lack of integration as suggested by those who support the ban in public spaces is not a strong argument, considering the small number of women who engage in the practice in Europe. Whilst Muslim women have the hijab and the face veil imposed on them by gendered Qur'anic interpretations in the absence of their voices as discussed in part one of this thesis, where the limited choice for them is to remain out of public spaces, unless veiled so they can be considered modest. In the *S.A.S.* case the court is effectively ignoring the voices of those who veil, forcing a similar imposition; unveil in order to step out into public spaces and be seen as integrating or remain inside the home. In both cases the choices of the women are being replaced with those considered to be the right choices by the discourse on veiling.

¹⁰⁹⁶ Gohir, *supra* (n 485)

Does veiling impede communication?

According to the court that veiling impedes communication, is the second limb of the 'living together' argument. There are those such as Ferrari who believes that full face veiling and the burqa impede communication, yet feels prohibiting it is not the answer and leads her to suspect that:

The ban on wearing the burqa and the niqab in the streets and in other public places is not aimed at solving the concrete problems that these garments can give rise to. Such a ban is intended to communicate a message of condemnation of a religion and of a culture that are considered backward compared to others which are viewed as more respectful of the dignity of the human being, women's rights and gender equality¹⁰⁹⁷

Similarly, Howard whilst agreeing that the communication argument is 'probably, a valid one', does not believe that 'headscarves which leave the face free should be banned for this reason, nor that full face covering should be banned in all circumstances and at all times'.¹⁰⁹⁸ The full face veil or the burqa can hinder communication and social interaction between individuals, a point which Ali Bhai Brown makes very well as she reminds that 'When faces are hidden, what goes missing are those tiny, vital, facial signs of human contact and undeclared mutuality'.¹⁰⁹⁹ This social interaction can take place in a number of settings: in private, public or public spaces, whether that is out on the street, in day to day contact with individuals or in an employment setting. It is not confined to the spoken words only; it includes gestures, the expression of emotions, facial expressions or simply the demeanour of a person. These are further coupled with other bodily cues for example the use of eyebrows to show surprise or confusion, frowning, smiling, the twitching or biting of lips. Some or all of these signals form the communication process between individuals. There may be people who have auditory impairments and may need to lip read. Wearing a face veil can result in the absence of some of these which leads to decoding communication more difficult.

The communication argument in the veiling debate surfaced strongly when Jack Straw, member of parliament of Blackburn in the United Kingdom, asked one of his constituents who had come to see him in one of his advice surgeries to remove her veil, as it made him

¹⁰⁹⁷ Ferrari, supra (n 1088) 6

¹⁰⁹⁸ Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education*, supra (n 309) 42

¹⁰⁹⁹ Brown, supra (n 485)

uncomfortable speaking to people who came in to see him if he couldn't see their face. He is quoted as saying that a veil could be seen as 'a visible statement of separation and difference' and further stated that:

I felt uncomfortable about talking to someone "face to face" who I could not see...I think...that the conversation would be of greater value if the lady took the covering from her face. Indeed, the value of a meeting, as opposed to a letter or phone call, is so that you can – almost literally – see what the other person means, and not just hears what they say. So many of the judgements we all make about other people come from seeing their faces.¹¹⁰⁰

Although Mr Straw is reported as having made the comments to attract the white voters, he apologised for his comments four years later which some commentators criticise as a publicity stunt trying to win back votes from his Muslim constituents he had offended by his comments.¹¹⁰¹ Nevertheless, Mr Straw had raised a very important question about veiling and social interaction. The communication argument with respect to veiling has to be de-structured into two elements in order for an effective analysis. First, the effect of veiling on communication in an employment or an educational setting and secondly, the impact of veiling on communication in public spaces needs to be examined. Although there have been many cases regarding the use of headscarves in employment and education settings, the issue surrounding communication is only relevant to cases of full face veiling in those settings. The ECtHR has not had a case come before it specifically on this issue, other than the *S.A.S.* case where discussion by the court has been limited. Two UK domestic cases concerning the prohibition of the full face veil in employment and an education setting are worthy of discussion, one involving a bi-lingual support worker in a junior school and the other a secondary school pupil.

In *Azmi v. Kirklees*¹¹⁰² a bilingual support worker who worked in a junior school that consisted of predominately Muslim children, was suspended on the grounds for refusing an instruction not to wear her veil when in class with pupils assisting a male teacher. The applicant alleged

¹¹⁰⁰ David Bartlett, 'Lancashire Telegraph' *Straw in plea to Muslim women: Take off your veils* (Blackburn, 5 October 2006)

<http://www.lancashiretelegraph.co.uk/news/954145.straw_in_plea_to_muslim_women_take_off_your_veils/> accessed 12 June 2012

¹¹⁰¹ Paul Baker, Costas Gabrielatos and Tony McEnery, *Discourse Analysis and Media Attitudes: The Representation of Islam in the British Press* (Cambridge University Press 2013) 219

¹¹⁰² *Azmi v. Kirklees Metropolitan Borough Council* [2007] IRLR 434 (EAT)

this was direct or indirect discrimination on the grounds of religion. The school had found that although 'Gesture and body language including facial expression reinforce the spoken word' and noted the applicant's 'lovely friendly smiling manner with the children and how they responded well to this,' the children could not respond to her teaching so well when her face was concealed.¹¹⁰³The school argued that:

Obscuring the face and mouth reduces the non-verbal signals required between adult and pupil, both in the classroom and other communal parts of the School. A pupil needs to see the adult's full face in order to receive optimum communication.' And furthermore 'Schools are professional settings where communication is vital, both between adults and pupils and between adults.' And 'It follows that for teachers or support workers wearing a veil in the workplace will prevent full and effective communication being maintained.' And therefore in the school's view 'the desire to express religious identity does not overcome the primary requirement for optimal communication between adults and children.'¹¹⁰⁴

The Tribunal found that that the decision to suspend the applicant was not direct discrimination, on the grounds of religion or belief and though it was indirectly discriminatory, it was lawful, being proportionate in support of a legitimate aim, thereby upholding the school's decision to suspend her for refusing to remove the veil.

Similarly in *X v. Y*¹¹⁰⁵ where a secondary school girl was suspended for refusing to remove her full face veil. In the failed judicial review action against the school's decision where the school argued the importance of unimpeded communication, in which the veil acts as interference to that process. First of all the school argued that wearing the veil 'would tend to undermine the development of empathy between staff and students and between the students themselves and as such it may affect positive relationships.'¹¹⁰⁶ And furthermore in respect of the veil's impact on effective teaching, just as in the *Azmi* case, the school argued that effective teaching depended on students being able to interact with each other, in particular with the teacher who in her own words stated:

¹¹⁰³ Ibid paras 10,17

¹¹⁰⁴ Ibid para 11

¹¹⁰⁵ *X v. Y* [2007] EWHC 298 (Admin)

¹¹⁰⁶ Ibid para 64 f

Being able to see facial expressions is a key component of effective classroom interaction. Successful teaching depends on the teacher being able 'to read' a student to see if the student understands, is paying attention, is distressed, or is enthusiastic. This also applies to interaction between students in group work. I think that wearing a niqab would impede this interaction between students in group work. I think that wearing a niqab would impede this interaction between staff and student.¹¹⁰⁷

Both of these examples are where the veil does act as a barrier to effective communication and disclose legitimate grounds for prohibiting the wearing of the full face veil. The negative effects of veiling on learning are acknowledged by Muslim female teachers such as Fatema Mayata, a young religious studies teacher who wears the veil, but at the same time says 'there are limits to wearing the veil' and admits that 'One cannot teach students when the face is covered'.¹¹⁰⁸ There are cases other than in teaching where wearing the veil has been seen as a hindrance to communication, for example, where a judge had to stop proceedings when a Muslim woman legal executive representing a client before the Asylum and Immigration Tribunal refused to remove her veil when asked to by the judge, because he could not hear her properly.¹¹⁰⁹ This became a live issue for the courts and led to Guidance for the judiciary on the wearing of veils in court, drawn up by the President of the Asylum and Immigration Tribunal who said has said judges can request the removal of a veil if:

A judge or other party to the proceedings is unable to hear the representative clearly then the interests of justice are not served, and other arrangements will need to be made... Such arrangements will vary from case to case, subject to judicial discretion and the interests of all parties.¹¹¹⁰

However, the matter of veils did not simply stop at lawyers veiling in court, but also extended to the question of witnesses refusing to remove their veils whilst testifying. This led Judge

¹¹⁰⁷ Ibid para 64 g

¹¹⁰⁸ Shirazi and Mishra, 'Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States', supra (n 290) 50

¹¹⁰⁹ Joshua Rozenberg, 'Lawyer Refuses to Take off Veil' *The Telegraph* (8 November 2006) <<http://www.telegraph.co.uk/news/uknews/1533542/Lawyer-refuses-to-take-off-veil.html>> accessed 20 October 2013

¹¹¹⁰ 'Lawyers' veils should be removed if they affect justice, says guidance' [2006] 10 November 2006 Solicitors Journal <http://www.solicitorsjournal.com/news/legal-profession/courts/lawyers-veils-should-be-removed-if-they-affect-justice-says-guidance> accessed 20 October 2012

Murphy to consider the issue of veiling by defendants in court and he ruled that the defendant was free to wear the veil during trial, but added that it was crucial for the jury to see her while she was giving evidence, concluding that 'If the defendant gives evidence she must remove the veil throughout her evidence.' He further stated that the face veil had become the 'elephant in the court room'.¹¹¹¹ In all the above cases there has been an institutional space approach. However, there are grey areas such as hospitals where according to Ferrari, a 'healthy pragmatism is needed'. She elaborates that 'A patient who asks to be admitted to hospital wearing a veil is one thing but a teacher who wants to teach from behind a screen is another'.¹¹¹²

The negative impact that face coverings have on impairment to speech intelligibility has been confirmed by scientific studies, but has been confined to a focus on masks used by the military,¹¹¹³ emergency services¹¹¹⁴ and the use of masks by students in oral language examinations during the SARS outbreak.¹¹¹⁵ Similarly, the negative impact on acoustics and speech intelligibility by veiling has been studied by Donnelly, Llamas and Watt culminating in findings that confirm that it can impede communication.¹¹¹⁶ Therefore the communication argument has cogency when the veiled woman is in a situation where speech intelligibility or decoding is crucial, and the use of visual cues would allow the receiver of speech to better decode the meaning vis-à-vis those with a hearing impairment.

The education setting and the emergency services would be prime examples where the auditory is combined with the visual, to enable, either effective learning in the classroom or to provide a service in an emergency situation, where on the spot decisions are made. An example of this would be where a doctor in an emergency situation may rely on facial expressions during a course of treatment. Studies have affirmed this as in the one carried out by Mistry Et Al on the effects of veiling when carrying out psychiatric assessments. They conclude that the majority of psychologists and psychiatrists believed that 'clinical assessment

¹¹¹¹ The Queen -v- D (R) 16 September 2013, The Crown Court at Blackfriars

¹¹¹² Ferrari, supra (1088) 7

¹¹¹³ J. Bishop, R.H. Bahr and M. Gelfer, 'Near-Filed Speech Intelligibility in Chemical-Biological Warfare Masks' (1989) 164 Military Medicine 543

¹¹¹⁴ Z.S Bond, T.J Moore and B. Gable, 'Acoustic Phoenetic Characteristics of Speech Produced in Noise and While Wearing an Oxygen Mask' (1989) 85 Journal of the Acoustical Society of America 907

¹¹¹⁵ D. Coniam, 'The Impact of Wearing a Face Mask in a High Stakes Oral Examination: An Exploratory Post SARS Study in Hong Kong' (2005) 2 Language Assessment Quarterly 235

¹¹¹⁶ Damien Donnelly, Carmen Llamas and Dominic Watt, 'Effects of Different Types of Face Covering on Speech Acoustics and Intelligibility: Some Preliminary Observations' (International Association for Forensic Phonetics and Acoustics Conference, Plymouth, July 2007)

may be compromised, although [they were] aware of cultural sensitivity around the area' and some professionals 'reported that they feel unable to assess or treat if the request to take the veil off is declined'.¹¹¹⁷

The importance of visual cues as part of body language has been the subject of many studies affirming that facial expressions and body language have more weighting than auditory signals.¹¹¹⁸ For example, according to Lewis just facial signals used in communication can result in the expression of no fewer than seventeen emotions.¹¹¹⁹ Of course there are other examples in employment settings where visual cues are not required, such as those who are employed in call centres or are in contact with people during their course of employment using information technology.

The second aspect of the communication argument is where the issue of 'civility and sociability'¹¹²⁰ arises in everyday social interaction, where barrier free communication between individuals could only take place in an environment of transparency. This requires everyone to be able to see each other's faces and all parties subject to this communication process are in an equal power situation. This leads to mutual respect and does not expose one party to any vulnerability and is even more crucial for those who have auditory impairment or are reliant on an element of lip reading and visual cues to enable effective communication.¹¹²¹ There are however those who argue that people are very good at adjusting to the modalities of communication, so it would not take long for people to adjust to someone communicating with a veil, for example Nussbaum who is against the banning of the burqa and veils, states that:

People who are blind notoriously develop hyper-acute auditory skills and are usually able to recognise individuals by their voices-as, of course, are people who contact one another regularly by telephone. In addition to eye contact, the Burqa certainly permits voice recognition, as well as recognition of characteristic bodily

¹¹¹⁷ Himanshu Mistry and others, 'Veiled Communication: Is Uncovering Necessary for Psychiatric Assessment' (2009) 46 *Transcultural Psychiatry* 642, 643

¹¹¹⁸ Albert Mehrabian, *Nonverbal Communication* (Aldine Transaction 1971); Judith Hall and Mark L. Knapp, *Non-Verbal Communication in Human Interaction* (Wadsworth Publishing Co Inc 2013)

¹¹¹⁹ Hedwig Lewis, *Body Language* (3rd Revised edn, Sage 2012) 40

¹¹²⁰ Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education*, supra (n 309) 34

¹¹²¹ Ibid 35

postures and gestures. I see no reason to think that people cannot quickly adjust to new ways of recognising individuality, as the situation requires.¹¹²²

Indeed there are times when the veil needs to be removed at airports or at banks and there are many obstacles to communication other than veiling. For example those who wear sunglasses and especially since a lot of people wear standard glasses that are photo chromatic and become dark disabling the reliance of expressions of the eye. But we never ask them to remove their glasses when communicating. Nussbaum uses the example of normal dress in the form of scarves covering people's faces in winter, yet we do not prohibit such activities on the grounds of communication.¹¹²³ She questions whether it is the veil itself that is objectionable as she asserts 'What inspires fear and mistrust in Europe, clearly, is not covering per se, but Muslim covering',¹¹²⁴ a point which the dissenting judges also raised in *S.A.S.*:

The majority speak of "practices or attitudes ... which would fundamentally call into question the possibility of open interpersonal relationships"... The Government of the Netherlands, justifying a Bill before that country's Parliament, pointed to a threat not only to "social interaction", but also to a subjective "feeling of safety"... It seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself, which – unlike perhaps certain other dress-codes – cannot be perceived as aggressive per se, but by the philosophy that is presumed to be linked to it. Thus the recurring motives for not tolerating the full-face veil are based on interpretations of its symbolic meaning...¹¹²⁵

The dissenting judges provide evidence of such fears from the French law's legislative history:

The first report on "the wearing of the full-face veil on national territory", by a French parliamentary commission, saw in the veil "a symbol of a form of subservience". The explanatory memorandum to the French Bill referred to its "symbolic and dehumanising violence"... The full-face veil was also linked to the "self-confinement of any individual who cuts himself off from others whilst living

¹¹²² Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*, supra (n 161) 112

¹¹²³ Nussbaum, 'Veiled Threats', supra (n 456)

¹¹²⁴ Ibid

¹¹²⁵ *S.A.S. v. France [GC]*, supra (n 29) dissenting Judgement para 6

among them” ... Women who wear such clothing have been described as “effaced” from public space...¹¹²⁶

It is questionable as to the frequency of direct communicative contact a non-wearer of the veil has in their day to day lives with those who wear the veil for it to be problematic, and this is something the court in its own assessment made a reference to, highlighting how small the numbers of women who veil reside in France and therefore the incidence of communication being very small:

It can be seen, among other things, from the report “on the wearing of the full-face veil on national territory” prepared by a commission of the National Assembly and deposited on 26 January 2010, that about 1,900 women wore the Islamic full-face veil in France at the end of 2009, of whom about 270 were living in French overseas administrative areas (see paragraph 16 above). This is a small proportion in relation to the French population of about sixty-five million and to the number of Muslims living in France. It may thus seem excessive to respond to such a situation by imposing a blanket ban.¹¹²⁷

The issue in *S.A.S.* is not just about communication but social interaction generally with the wider population. There is no doubt that some people simply do not understand why women would want to veil and more so, young children would wonder why some have their faces covered? The requirements of civility of social interaction is thus not erasure of the face in public, but the open and transparent expression of being open to interaction, which is free from fear shock or disturbance from the sight of a veil or a burqa. However a point Nussbaum¹¹²⁸ notes which the dissenting judges also echo, is that just because the exposed face plays an important part in social interaction, it cannot be said that human interaction is impossible if the full face is not shown. They give examples of skiing, motorcycle helmets, and costumes in carnivals which no one can claim that ‘the minimum requirements of life in society are not respected. People can socialise without necessarily looking into each other’s eyes’.¹¹²⁹ This is especially so in the contemporary world where the use of information communication

¹¹²⁶ *Ibid* dissenting Judgement para 6

¹¹²⁷ *S.A.S. v. France [GC]*, supra (n 29) para 145

¹¹²⁸ Nussbaum, ‘Veiled Threats’, supra (n 456)

¹¹²⁹ *S.A.S. v. France [GC]*, supra (n 29) dissenting Judgement para 9

technology and the use of social networking sites has proliferated and a person need not even be in the physical presence of others to deem it social interaction.

Even if the majority society disagrees with or is shocked or offended by opinions or fears them, the ECtHR jurisprudence is clear that they are not grounds for prohibition. Since these principles are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society,¹¹³⁰ the same principles must be applicable to veiling. Another compelling argument put forward by the dissenting judges on the issue of social interaction is that one does not have a right to make contact with others against their will in public places; otherwise the right would also have a corresponding obligation which would be contrary to the ECHR. Although communication is an essential element of life in society, respect for private life entails the right not to communicate, enter into contact with others in public places; effectively the right to remain an outsider.¹¹³¹ In this respect Mancini argues that personal freedom must prevail over paternalistic considerations as the judgement on what's best for others is based on our own values, principles and habits.¹¹³²

However, it has to be equally objectionable if young girls are being encouraged to veil and that choice of optimum communication is being inhibited at an early stage of their lives, where there is a danger of ostracisation if they don't veil, and being dejected if they do. In this respect Ali Bhai Brown notes that 'Parents of tiny girls with headscarves tell me they are training them to cover themselves. Informed choice is one thing, but trained choice? Or a choice where females know they will be ostracised if they don't comply?'¹¹³³ However concerns over children although valid do not always pay heed to the realities of the framework of law, which encourages the young to appreciate and understand their autonomy, for example by consenting to medical treatment¹¹³⁴ or have body piercing.

The lack of the prescribed legitimate aims, which were tenuously connected by the slippery and novel notion of living together arguably, gives states a much easier route to prohibit religious practices of minorities, simply based on subjective arguments that a particular practice offends the requirements of living together. Especially as no definition of the term

¹¹³⁰ *Handyside v. United Kingdom*, supra (n 630); *Otto-Preminger-Institut v. Austria*, supra (n 679); *Vajnai v. Hungary*, supra (n 1018)

¹¹³¹ *S.A.S. v. France [GC]*, supra (n 29) dissenting Judgement para 8

¹¹³² Letizia Mancini, 'Burqa, Niqab and Women's Rights' in Alessandro Ferrari and Sabrina Pastorelli (eds), *The Burqa Affair Across Europe* (Ashgate 2013)

¹¹³³ Brown, supra (n 485)

¹¹³⁴ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL)

was furnished, leaving it very much in the hands of a state with the consequence that each offending state could present the court with a different meaning of the term. Such fluidity in what should be a concrete principle, considering it can have such drastic impacts on those affected, leaves the jurisprudence of the court far from satisfactory in terms of consistency and certainty of the law. The endorsement of such a principle by the court gives rise to the argument that the court appears to be drawing a distinction between the homogenous majority society and the 'other' minority society that engages in religious manifestations in public spaces.

Veiling and Article 10 ECHR

It has already been established that veiling is highly contextual with no static meaning and goes beyond just an Article 9 action. The applicant in *S.A.S.* also framed the action under Article 10 but the ECtHR did not give it the consideration it warranted. McGoldrick is clear that some women 'regard wearing the hijab as a part of their individual and group identity'¹¹³⁵ and according to him freedom of expression can be framed as a right to an identity that publicly expresses a link with groups, communities or by choice of dress and symbols. The French law prohibiting face concealment leads to the misrecognition of Muslim women that is harmful to their selfhood. Such harm from misrecognition is noted by Taylor who states that it 'can inflict a grievous wound, saddling it's victims with a crippling self-hatred'¹¹³⁶ and 'Non recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being'.¹¹³⁷ And as such, he observes that it is important to understand other people's language of self-understanding as it can lead to protection against the host society's ethnocentrism.¹¹³⁸ The importance of such an observation is evident in the passing of the French laws on full face concealment because as Eisenberg notes, such 'conflicts will be understood in light of false stereotypes about minority groups and false assumptions about the neutrality and fairness of dominant practices and procedures'.¹¹³⁹

The Muslim identity transmitted via the face veil is considered important to the wearers of the veil, as it projects their attachments to a particular community with a particular way of life, sets of beliefs, or practices that play a central role in their self-conception or self-

¹¹³⁵ McGoldrick, 'Extreme Religious Dress; Perspectives on Veiling Controversies', supra (n 859) 405

¹¹³⁶ Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton University Press 1994) 26

¹¹³⁷ Ibid 25

¹¹³⁸ Charles Taylor, 'Understanding and Ethnocentricity' in Charles Taylor (ed), *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press 1985) 126

¹¹³⁹ Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford University Press 2009) 140

understanding. So practices such as veiling for some Muslim women are an important aspect of their identity and that was recognised by the court too.¹¹⁴⁰ Such a practice according to Eisenberg 'reflects something important about their sense of who they are or that they cannot realize something important about their sense of who they are or that they cannot realize something important about themselves without access to it'.¹¹⁴¹ Dress is not politically or culturally neutral, it is loaded with significance and we must interpret the language of dress in any given situation. If veiling is found to be offensive to the majority society, then the ECtHR needed to refer back to its own jurisprudence where it has held that freedom of expression:

is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.¹¹⁴²

As discussed in part one of the thesis, some women veil in order to express resistance to political control, modernity, to avoid being judged by their looks or as a symbol of culture and a woman is entitled to express each one of these meanings. Had the court considered the multiple meanings of the veil, it may have acknowledged the right to such freedom of expression. Certainly, dress is and can be used as a form of social control and behaviour by groups¹¹⁴³ but how women choose to dress should not be dominated by others who may be offended by a particular form of dress, or by the law, bar where intercession of the law is necessary for legitimate reasons. Otherwise, as Keenan notes we may all become 'inveterate hermeneuticians engaged in a never-ending round of conjecture and refutation as to what this or that look is saying'?¹¹⁴⁴

¹¹⁴⁰ *S.A.S. v. France [GC]*, supra (n 29) Para 139

¹¹⁴¹ Eisenberg, supra (n 1139) 18

¹¹⁴² *Handyside v. United Kingdom*, supra (n 630) para 49

¹¹⁴³ Mary Douglas, *Natural Symbols* (Routledge 2003) xxxvi

¹¹⁴⁴ William J.F Keenan, 'Dress Freedom: The Personal and Political' in William J.F Keenan (ed), *Dressed to Impress: Looking the Part* (Berg 2001) 181

Veiling and Article 8 ECHR

Choice of dress is clearly within the ambit of Article 8 as a right to private life¹¹⁴⁵ and even those women, who do not veil, oppose any prohibition on the ground that women have the right to choose¹¹⁴⁶ and the court in *S.A.S.* acknowledged this stating that ‘The Court is thus of the view that personal choices as to an individual’s desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life’.¹¹⁴⁷ The opposition to outright banning is wrong and even feminists such as Ali who is vehemently opposed to the practice of veiling considers as an inappropriate method to deal with the issue of oppression raised by those who oppose the practice.¹¹⁴⁸ The dignity, autonomy and self-determination of an individual and the resultant development of a right to identity as a derivative of dignity is something the ECtHR has acknowledged in its jurisprudence under the right to respect for one’s private life under Article 8.¹¹⁴⁹ And this has been recognised as a right by the UN human Rights Committee¹¹⁵⁰ and the European Court of Justice.¹¹⁵¹ The Grand Chamber also affirmed in *S.A.S.* that ‘Personal choices as to an individual’s desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life.’ And that:

A measure emanating from a public authority which restricts a choice of this kind will therefore, in principle, constitute an interference with the exercise of the right to respect for private life within the meaning of Article 8 of the Convention... Consequently, the ban on wearing clothing designed to conceal the face in public places, pursuant to the Law of 11 October 2010, falls under Article 8 of the Convention.¹¹⁵²

Yet the court still allowed the French law to prohibit this expression of personality. The applicant in *S.A.S.* and the veiled women affected by the ban were expecting the court to have

¹¹⁴⁵ McGoldrick, ‘Extreme Religious Dress; Perspectives on Veiling Controversies’, supra (n 859) 406

¹¹⁴⁶ Dounia Bouzar and Saida Kada, *Une Voilee, L’Autre Pas (L’) ‘One Veiled the Other Not’* (Albin Michel 2003)

¹¹⁴⁷ *S.A.S. v. France [GC]*, supra (n 29) para 107

¹¹⁴⁸ Ayaan Hirsi Ali, ‘Banning the Burqa Misses the Point’ (*Fora tv*, 2010)

<<http://www.youtube.com/watch?v=z40ZnDLeXUk&feature=youtu.be>> accessed 6 August 2013

¹¹⁴⁹ Marshall, ‘Conditions for Freedom?: European Human Rights Law and the Islamic Headscarf Debate’, supra (n 318); Marshall, *Human Rights Law and Personal Identity*, supra (n 198) 36

¹¹⁵⁰ *Manuel Wackenheim v France*, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002)

¹¹⁵¹ *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberburdermeisterin der Bundesstadt Bonn* [2004] ECR I-9609

¹¹⁵² *S.A.S. v. France* para, supra (n 29) 107

their private life respected, which according to McGoldrick would be recognition of not 'merely equality of treatment, but rather equality of respect'. This respect according to Moore has a clear link with the identity and self-esteem of women,¹¹⁵³ affirmed by Marshall who referring to Honneth states that 'The three components of self-confidence, self-respect and self-esteem enable our identity to be recognised'.¹¹⁵⁴

There is a relationship between identity and respect, because identity is linked to the distinct method by which individuals can understand themselves in a social context and according to Taylor is the 'background against which our ...desires and opinions and aspirations make sense'.¹¹⁵⁵ This suggests that Muslim women who veil for reasons of enhancing their piety or because they believe that it is a religious mandate can lose that self-respect if they are prohibited from doing so. Being treated differently from others would have the consequence of loss of self-respect as noted by Marshall who states that 'Self-respect is the matter of viewing oneself as entitled to the same status and treatment as every other person. The law represents a relation of mutual recognition through which every person, as bearer of the same claims, experiences equal respect'.¹¹⁵⁶ Furthermore she notes that 'When an inferior or demeaning image is projected on another by the state or through others and the state allows this to happen, this can distort'.¹¹⁵⁷ Citing Taylor she adds that the denial of recognition can be a form of oppression.¹¹⁵⁸

If the objection to veiling by the French society is that forced veiling is wrong, then surely the same society should object to forced unveiling, because for the women in question the consequence of forced unveiling as in France and forced veiling as in Afghanistan is the same. This in Hirschmann's words is replacing 'one form of social control with another',¹¹⁵⁹ thus prohibiting veiling is misrecognising Muslim women and disrespecting their identity.¹¹⁶⁰ Such prohibitions lead to their confinement to within the walls of their homes and cutting out employment prospects. Breaking this link with the wider society results in a failure of due respect or recognition, and such denials of social contact 'fails dismally to accord them respect

¹¹⁵³ Margaret Moore, 'Identity Claims and Identity Politics: A limited Defence' in Ignor Primoratz and Aleksandor Pavkovic (eds), *Identity, Self-Determination and Secession* (Ashgate 2006) 28

¹¹⁵⁴ Marshall, *Human Rights Law and Personal Identity*, supra (n 198) 143

¹¹⁵⁵ Taylor, *Multiculturalism and the Politics of Recognition*, supra (n 1136) 33

¹¹⁵⁶ Marshall, *Human Rights Law and Personal Identity*, supra (n 198) 189

¹¹⁵⁷ Ibid 188

¹¹⁵⁸ Ibid

¹¹⁵⁹ Hirschmann, 'Eastern Veiling, Western Freedom', supra (n 273) 466

¹¹⁶⁰ Marshall, *Human Rights Law and Personal Identity*, supra (n 198) 206

or recognition'.¹¹⁶¹ Although in this respect McGoldrick points out that in an international veiling context, if forced veiling as in Saudi Arabia and Afghanistan is not seen as violating international human rights mechanisms, then a state could prohibit veiling under certain circumstances or contexts, but he doesn't highlight these.¹¹⁶² But that would indeed be the equivalent of fixing or freezing one's identity in law 'which is problematic' as it limits the choices veiled women can make and try new or different 'means of living and being'.¹¹⁶³

Marshall's approach is more sensitive of preserving the dignity of the veiled women based on the interpretation of human dignity and freedom which empowers women, rather than constrain them. This would allow creation of their identity and its recognition thus facilitating veiling choices and identity development as they deem appropriate¹¹⁶⁴ and in this respect she projects her view on criminalising veiling clearly:

The fear of the other, imposing criminality onto the wearing of a piece of clothing, fails to recognise the other person completely in a democratic society as worthy of respect for who they are...Criminalising anyone for looking a particular way does the opposite to building qualities of self-confidence, self-respect and self-esteem...It is not a human rights court's role to decide whether or not a woman needs to wear a full face veil according to the precepts of Islam. What is decisive is that the woman considers it be necessary in her interpretation or opinion...she may want to wear it as an expression of her personality for some other reason. That view should be respected.¹¹⁶⁵

Through the lack of respect for her private life as guaranteed by Article 8, Muslim veiled women in France are misrecognised, with the consequence that their social recognition is being withdrawn by the French law on full face concealment. This leads to them being otherised not just by those who oppose veiling, but the state, as well as the ECtHR that should be the guardian of their right to identity and dignity under Article 8. If the court had listened to the voices of Muslim women who veil, it would have realised that the meaning of veiling extends beyond Article 9 and warrants a greater analysis of Article 8 rights associated with veiling giving recognition to their identity, dignity and personality.

¹¹⁶¹ Ibid 209

¹¹⁶² McGoldrick, 'Extreme Religious Dress; Perspectives on Veiling Controversies', supra (n 859) 408

¹¹⁶³ Marshall, *Human Rights Law and Personal Identity*, supra (n 198) 236

¹¹⁶⁴ Ibid 213

¹¹⁶⁵ Ibid 215

Conclusion

The case on hand was a great opportunity for the Grand Chamber to amend its previous inadequate jurisprudence on religious symbols cases, but it did not do so. The decision and the court's reasoning in *S.A.S.* is surprising as it is incongruent with the ultimate result and the court's own comments. On the one hand the court finds that France had the power to secure the conditions for its society to live together as that was within the scope of protection of rights and freedom of others. Yet on the other it had highlighted the weaknesses in the judgement suggesting that the prohibition on veiling was disproportionate to the legitimate aim pursued by France. For example, the court by its own acknowledgement recognised that the number of women who veil is small and thus hardly a threat to life in a democratic state:

It is true that only a small number of women are concerned. It can be seen, among other things, from the report "on the wearing of the full-face veil on national territory" prepared by a commission of the National Assembly and deposited on 26 January 2010, that about 1,900 women wore the Islamic full-face veil in France at the end of 2009, of whom about 270 were living in French overseas administrative areas...This is a small proportion in relation to the French population of about sixty-five million and to the number of Muslims living in France. It may thus seem excessive to respond to such a situation by imposing a blanket ban.¹¹⁶⁶

The French law could have a negative impact on these women by way of isolating them and restricting their Article 9 rights, autonomy and right to private life, as well as a threat to their identity.¹¹⁶⁷ There were a number of international bodies who felt the restrictions on veiling were disproportionate, yet the court did not pay any heed to such consensus.¹¹⁶⁸ Furthermore the court found that the fact that homophobic remarks preceded the adoption of the French law and although, it is not the court's place to comment on the desirability of such a law, it contributes to consolidating stereotypes that affect minorities and of intolerance when the state has a duty to promote tolerance. The court also noted that offending remarks against religious and ethnic groups 'are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom

¹¹⁶⁶ *S.A.S. v. France [GC]*, supra (n 29) para 145

¹¹⁶⁷ *Ibid* para 146

¹¹⁶⁸ *Ibid* para 147

of expression that it protects'.¹¹⁶⁹ Since the court had these concerns one would expect greater scrutiny to ensure that the intolerance against veiled women had no influence on the adoption of the French law. This was an issue raised by the dissenting judges who noted that the prohibition could be viewed as selective pluralism and limited tolerance against minority communities. And that rather than ensuring tolerance between the majority and minority community by France, it simply removed what it saw as the cause of the tension which is contrary to the court's previous jurisprudence on article 9 cases.¹¹⁷⁰ The court tried to justify the small criminal penalty for those convicted for veiling under the France law, which means that the fact that veiling in public had been criminalised was a concern for the court, otherwise why would it try to justify it? What the court seemed to overlook was not just the cumulative penalties for those who wished to veil but the fact that they were being criminalised for an act that contains no element of harm, and arguably if the penalty was that small then why was there a need to have it at all?

Such weaknesses made evident by the court itself pose a question mark on the proportionality of the French law, yet it still found France's pursuit of a legitimate aim proportionate and deferred a wide margin of appreciation to the state. Such a conclusion as Vickers says is 'disappointing, particularly the reliance on the nebulous concept of "living together", an aim which could equally be met by promoting a "live and let live" attitude, and which moreover could lead to bans on anything that makes the majority feel uncomfortable.'¹¹⁷¹ The decision is problematic considering the ECtHR judges albeit in their dissenting opinions in *Feldebrugge v. Netherlands*¹¹⁷² and *Winterwerp v. the Netherlands*,¹¹⁷³ had warned the court against introducing new concepts or spheres of application to be introduced into the Convention and that Convention rights should not be interpreted in a way that impairs the essence of that right. And as such the decision is 'a worrying development' if the right to manifestation of religion is to 'have any 'practical meaning'.¹¹⁷⁴

¹¹⁶⁹ Ibid para 149

¹¹⁷⁰ In *Serif v. Greece*, (n 877) the court stated that 'The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other' para 53

¹¹⁷¹ Vickers, 'Conform or be Confined: S.A.S. v France', supra (n 985)

¹¹⁷² *Feldbrugge v. The Netherlands* App no 8562/79, (29 May 1986) para 24

¹¹⁷³ *Winterwerp v. The Netherlands* App no 6301/73, (24 October 1979) para 60

¹¹⁷⁴ Stephanie Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?' (*Blog of the European Journal of International Law*, 2014) <<http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>> accessed 20 July 2014

The court failed to listen to the voices of those women who veil by not taking on board the research presented by the third part interveners, resulting in a lost opportunity to lay to rest some of the negative stereotypes associated with veiling. Instead it allowed the creation of a new negative label that Muslim women who veil refuse to integrate with the wider society and live together. Had the court paid more regard to the woman at the centre of the debate, it may have considered her Article 8 and 10 rights more seriously than it did. That would have been an acknowledgement that veiling is contextual and has many meanings, which would have been more in tune with deciding cases on an individual basis, rather than the judicially preferred Article 9, which is proving to be affording little if any protection to those who veil. This coupled with the acceptance by the court of a state created principle of 'living together' may mean that it is not only full face veiling that could be prohibited but the extension of the principle to other forms of dress or behaviour is not impossible. Thus the court although having moved in the right direction by recognising that women who veil through their own free will are not the victims of the gender inequality echoed in *Dahlab*¹¹⁷⁵ and *Sahin*¹¹⁷⁶ has now left an additional problem for manifestations of religious practices of minorities in Europe; an obscure requirement of 'living together' that incorporates the views and values of the majority society, but without any indication of what those values are, leaving open to threat those religious and cultural practices, which the majority disagrees with and takes a dislike.

¹¹⁷⁵ *Dahlab v. Switzerland*, supra (n 27)

¹¹⁷⁶ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

CONCLUDING CHAPTER

The hijab and particularly the full face veil have been the subject of many controversies evoking polarised discourses of oppression and emancipation, which have been at the forefront of the debates and are still pervasive. This thesis examines and links three distinct perspectives; the religious, socio-feministic and the legal. By doing so, the analysis conducted here attempted to reflect the fact that the practice of veiling has no singular universal meaning but is dependent on individualities and multiplicities. The discourses have associated veiling with: negative and positive stereotypes, objectification, control of female sexuality, gender oppression, Islamic fundamentalism, cultural customs, political protest, false consciousness, proselytism, security concerns, refusal to live together, modesty, resistance to modernity, deflection of the male gaze, emancipation, expression of identity, patriarchal bargaining, fashion and compliance to state enforced dress codes. Such variations have not only made it difficult to discern the non-religious from the religious, with some Muslims declaring them as cultural edicts whilst others projecting them as religious duties but have also made it extremely difficult to ascribe an all embracing meaning to the practice. The tension within the debates on Muslim veiling has been primarily due to the binary standpoints of the adherents and opponents of veiling, each claiming that their respective discourses hold the true understanding, meaning and significance of veiling. The discrepancies between the polarised positions have led to many of the controversies surrounding the practice with those who oppose it calling for the practice to be prohibited in public places whilst its supporters place reliance on the right to religious freedom and have looked to the ECtHR for protection of that freedom using the ECHR framework of human rights.

The hijab and the veil are items of clothing and like all other clothes they are loaded with many symbolic meanings and can serve many purposes. Dress codes are based on social expectations, culture, context and location and the forms of dress are subject to generational differences. For example, in a European setting denim jeans and pumps worn by young boys in the late 60's were directly associated with their family's financial inability to buy trousers and shoes for out of school wear, whereas jeans and trainers in current times have become the most popular dress items throughout the world and are considered trendy items. Similarly dress codes have been at a variance amongst Muslim women who have been motivated by different factors and situations, just like other people around the world have expectations and social norms that influence how people are to dress, for example people do not go to church

or the opera wearing shorts and flip flops. Yet no other item of clothing has generated such fierce oppositions in recent times as did items of clothing worn by Muslim women.

Modesty and its discontents

The first perspective examined by this thesis is that of the beliefs or perceptions of Muslim men and women that the hijab or the veil is a religious obligation related to modesty. Verses of the Qur'an, which are believed by Muslims to apply to Muslim women's dress codes and the meanings of these, have been the inventory entirely comprising of male religious scholars, with no woman exegete playing any substantial role in interpreting or bearing responsibility for any of the traditional understanding of how women should dress. The meaning and application of these dress codes was decided centuries ago when cultural customs such as tribal and family honour coupled with subordinate roles of women were crucial to the control of women and the male imposed social order.¹¹⁷⁷

Arguably, Muslim women's veiling is a product of history and culture and not purely an Islamic creation, therefore like the other Abrahamic religions it is not free from such influences. Such a background to the Qur'anic hermeneutics raises a question of whether those interpretations imposing modes of dress on Muslim women who comply in the name of modesty are based on free choice of women or in compliance to custom and tradition as opposed to a religious duty. This is an important issue surrounding choice because any later reliance by these women on the law via human rights mechanisms such as the ECHR is dependent on whether these choices are free or not and whether the applicant subjectively held the belief that the hijab or the veil are obligated by Islam. This reasoning is adopted by those who argue the veil is mandated by religion in order to be modest and that idea of a free choice has to be questioned as the current interpretations of the verses only allow limited options for making such choices; wear the hijab or the veil in order to be modest or neither and be seen as immodest. This argument from a freedom perspective is challengeable since there are no options or limited options, which are pre-determined by patriarchal interpretations of the sacred texts. Freedom requires not only options but the ability to choose or reject and being free from coercion or influence.

The restriction of the options available to Muslim women by men with power and monopoly to interpret the religious texts has allowed religious scholars to suit themselves and men in Muslim societies. Since such dress codes do not apply to men and they have been generated

¹¹⁷⁷ Eli Alshech, 'Out of Sight and Therefore Out of Mind: Early Sunni Islamic Modesty Regulations and the Creation of Spheres of Privacy' (2007) 66 *Journal of Near Eastern Studies* 267

by male interpretations it is argued that they have used sacred texts to regulate women's presence in public spaces, whilst allowing themselves the freedom to such spaces and gendered power and control over the religious discourse, thus ensuring that Muslim women are silenced in matters associated with religious dress.

One of the most cited reasons used by Muslim women and men for veiling has been the concept of modesty believed by them to be a religious duty. Indeed there are women who veil for reasons of modesty and this is linked with faith, but Islamic ethics extends beyond just a question of dress and is reflected in a number of other positive attributes of a person including speech, conduct in public and aspects of inner modesty before God. This thesis has shown that the use of clothing as a form of modesty is open to a number of challenges, for example, the use of the hijab or the veil as a method of expressing and preserving modesty is premised on the notion that those who do not use such clothing are immodest. There is a majority of non-veil wearing Muslim and non-Muslim women who do not veil, yet they maintain their modesty by controlling their sexualities internally without the need for religious clothing and to be pronouncing these women as immodest by default is inscribing non-veiled women with a negative gender stereotype and is essentialist in nature.

The thesis also showed that the use of the modesty doctrine as a means of limiting a woman's sexuality as mandated by classical interpretations and the religious discourse on veiling is objectionable on the grounds that Muslim women are being considered as having unleashed sexuality, which needs to be chained for the retention of family honour as well as being responsible for the sexual urges of men leads them to being treated as cultural objects, instead of equal beings as affirmed by the Qur'an. Thus the gender equality between Muslim men and women is being fractured by male orientated interpretations, which have the effect of placing the burden of controlling men's sexual desires and urges on Muslim women instead of the men taking religious responsibility for their own inner immodesty.

The Islamic religious discourse paradoxically uses the veil as a tool for deflecting the male gaze as a means of preserving modesty through the restriction of female sexuality. This is because the face of the woman that attracts men is not discernible and in any event Muslim men are under an obligation to lower their gaze too, but without the need to cover their own face, which leaves open the possibility of the veiled woman being attracted to a man. Furthermore this creates not only an uneven burden on the woman who veils but it is questionable whether it achieves its purpose. This is because in Muslim countries the majority male population is Muslim and the veil in such locations may serve the desired purpose of maintaining Islamic

modesty by deflecting the male gaze, but women who wear the full face veil in European countries, where the majority male population is non-Muslim and not bound by any divine injunction on lowering the gaze results in the veil being an object of attention, thus defeating the intended objective. This unintended result of veiling is that it confines to the private what should be public parts of women giving an opportunity for others to eroticise, which from a modesty perspective has to be considered unacceptable. Additionally the male gaze deflection purpose becomes devoid of meaning since the Qur'an imposes a duty on men to avert their gaze and if that duty was discharged as required by Islam, then Muslim women would need not veil because any risk to the modesty of the sexes would be achieved through self-control. It is this imbalance and the disregard for the contextualised interpretations that leads to the conclusion that the use of religious clothing to avoid attention as per the traditional interpretations of the Qur'anic verse was contextual and only intended for a particular time in Islamic history and for a particular purpose.

The religious mandate of the veil in order to avoid being harassed by men is still being perpetuated and used by male scholars as a means of ensuring Muslim women veil and segregate themselves from men, even though such threats are not as evident and in any event are catered for by the laws of European states. Even if this was a correct interpretation and meant to be ahistorical, it means that veiled women are responsible for diverting sexual harassment to women who do not veil, which from an Islamic equity viewpoint is clearly erroneous. If anything current research demonstrates that women who veil are being regularly subjected to threats and violence for wearing a veil,¹¹⁷⁸ therefore it is questionable why religion would permit the use of the veil to avoid harassment but it does not allow for its disuse in order to avoid physical threats and attacks.

The above criticisms of Muslim women's veiling in order to comply with male orientated interpretations have not only led to subordination of Muslim women by men but have also generated internal disagreements amongst Muslim men and women on the mandatory nature of veiling in Islam.¹¹⁷⁹ Such a state of affairs makes it difficult for those in European societies to understand the compulsory nature of veiling when Muslims themselves cannot agree. Furthermore, the adoption of the veil as per the traditional interpretations declaring it a religious obligation leads to the silencing of the voices of women who wear the hijab by those

¹¹⁷⁸ Open Society Foundations, *Behind the Veil: Why 122 women Choose to Wear the Full Face Veil in Britain* (2015) 129, < <https://www.opensocietyfoundations.org/reports/behind-veil> > accessed 28 August 2015; Zempi and Chakraborti, *supra* (n 291)

¹¹⁷⁹ Hargey, *supra* (n 30); Saidi, *supra* (n 50)

scholars who interpret the veil as obligatory and similarly those women who veil are muted by the opinions of the scholars who are of the opinion that only the hijab is a religious obligation. Each standpoint is questioning the choices of women and the interpretations of the Qur'anic texts that lead to the act of choosing to adopt the hijab or the veil. It is veiling in the context of this milieu that suffers from a hermeneutic deficit, which can only be addressed by re-interpretation of those texts believed by Muslims as imposing veiling on Muslim women. Such re-interpretations and polysemic readings have been and can be carried out by Muslim women,¹¹⁸⁰ in order to eliminate the patriarchal classical readings. This will enable the voices of those who veil to be heard opening up more options with respect to the dress codes for Muslim women and will lead to enhancing their freedom to choose their own option on how to discharge their religious obligations, as well as achieve freedom from the male control of their sexuality and religious knowledge.

The arguments adopted by those who oppose and support veiling consist of supporters of the veil arguing that a lack of or revealing clothes results in objectification of women whilst those who oppose the veil argue that covering the face also results in objectification. Both arguments are ineffective and inappropriate at improving the position of Muslim women who veil; this is because in each case the woman is objectified for the benefit of men. Whereas if those projecting these arguments were to pay attention to the damage to women by both standpoints and focussed on the recognition of choices by women as being free and autonomous irrespective of under or over clothing, that would achieve greater benefits for both groups of women involved as opposed to deflecting attention towards each other's inauthentic choice of clothing.

Despite some of the criticisms of the modesty doctrine, religious patriarchy does not simply belong to Islam's domain since textual interpretations of all the Abrahamic religions have been accused of male control over women and what is important is respect for religious choices made by Muslim women who veil, as without that the danger is that any inquiry would result in the complexities of testing the validity of the truths held by such women, which is beyond the remit of this thesis.

The oppression versus emancipation dichotomy

The theoretical socio-feministic framework is dominated by clashing viewpoints where one discourse negatively stereotypes veiling as an oppressive practice grounded in socialisation and wish for it to be banned in public spaces in Europe in order to liberate veiled Muslim

¹¹⁸⁰ Barlas, supra (n 99); Wadud, supra (n 197)

women. Whilst others inscribe a positive stereotype on the veil as a symbol of emancipation, asserting that the oppression perspective is rooted in cultural insensitivity and lack of understanding, which is due to the adoption of colonialist attitudes and a refusal to accept difference based on reductive assumptions of veiling. This then leads to ignoring contexts and individualities of women who adopt the practice, thus universalising the oppression associated with veiling. Although both viewpoints have dominated the discourse on veiling, neither perspective can address the complexities of the issue as each remains preoccupied with weakening the others perspective without acknowledging its own untenable position.

In order for the supporters of the dichotomous perspectives to gain a better understanding of veiling, the different meanings, situations and contexts of veiling have to be acknowledged. For example patriarchy exists in Muslim societies as it does in Western ones and it has to be accepted that the fact that women veil due to patriarchal households does not necessarily mean that prohibiting the veil would eliminate it, as that would only replace one method of control with another one that is equally oppressive for veiled women. This can be seen with the prohibition of the veil in France. In many cases Muslim women in such settings use the veil as a means to negotiate their access to public spaces, education and employment facilitating integration with the wider society, which helps strike a balance between the cultural and the modern, with a secondary effect that the level of patriarchy over any younger girls in the household would be decreased. So in this sense veiled women limit their agency in order to bargain for some and an increased freedom for other women in the household. This is because for some women it would be better to have some freedom than none and in any event over a period of time the gender relations would settle leading to more agentic lives for veiled women. Such increments of agency is evident from the younger Muslim women using hijabs and veils of different colours, styles and combining them with Western clothes. Therefore to declare such women as oppressed or emancipated by treating them as homogenous categories does not help them or hold strictly true for either standpoint, and rather than campaign for extremes such as bans on veiling or challenge free veiling, it is better to facilitate a gradual elimination of the subordination of women via the male imposed veil.

The academic *Ping-Pong* and refusal to acknowledge the others' viewpoints does not serve the veiled women at the centre of the debate. Neither does the feminist agenda based on the imperative to eliminate discriminatory practices affecting women. This is evident from the discourse on the hijab and the veil just as it was during the debates on the French prohibition

on religious symbols in state schools where feminists such as Amara¹¹⁸¹ were defending the prohibition and others such as Delphy who still continues to oppose it.¹¹⁸² Such difference does not portray feminism as an effective movement if the focus is on lack of parity between different factions of women. The effect of this warring is a loss of important discourse emerging which could service a theory that would truly enhance the positioning and parity of women. What appears to feature in a limited manner in the discourse on veiling is the positioning of those who maintain a middle ground that contains elements of gender equality that is coupled with some pragmatism such as Gohir who states:

Personally I am not keen on the veil as it overwhelmingly reinforces every conceivable Western prejudice about Muslims and Islam. I would even urge veiled Muslim women to consider the impact their choice is having on Muslim communities living in the West. However, from a gender perspective, I will vociferously continue to speak out on the right of women to make autonomous choices about their bodies whatever that may be – whether they live in the West or in Muslim countries.¹¹⁸³

Greater eminence is needed of commentators who acknowledge that women may be subjected to gender inequality due to patriarchal interpretations of the religious texts, or cultural norms and encourage Muslim women to emancipate themselves through un-reading such patriarchal interpretations. This has to include those feminists who adopt a middle ground in upholding Muslim veiling in Western societies, on the basis that veiling does contain an element of personal choice, thus preventing the issue of women's rights from getting drowned in the debate. The importance of this has been eloquently stated by Kacere:

A beautiful aspect of feminism is learning to see beyond the surface – seeing beneath the propaganda that teaches us how gender should be...We are so good at speaking of agency and bodily autonomy; we use it to talk about our right to have an abortion and to challenge rape culture. We used it to start a movement last year when Slutwalks throughout the continent expressed outrage at slut-shaming and our culture's notions of women's sexuality, challenging the legal

¹¹⁸¹ Amara and Zappi, *supra* (n 485)

¹¹⁸² Christine Delphy, *Separate and Dominate: Feminism and Racism After the War on Terror* (Verso Books 2015)

¹¹⁸³ Gohir, *supra* (n 485)

and cultural justifications for telling women what to wear and what to do with their bodies – and yet many feminists around the world supported France’s decision to ban the wearing of burqas last year.¹¹⁸⁴

The problem of dual essentialisms

A problematic issue addressed in the thesis is the oppositional stance adopted by the oppression and emancipation discourses highlighting the dual essentialisms evident in both discourses. There are elements of essentialism present when those who oppose veiling judge Muslim women who wear the hijab or the veil according to whether such women are free to make real choices restrained by the bonds of patriarchal traditions, but in such assessments, veiled women’s subjectivities and their voices are ignored or overridden. Indeed this may be due to false projection of repressed desires as inequality issues affecting women in Western societies are far from total elimination and deflecting focus onto women of other cultures appears to be an easier option in a climate where the place of religion especially Islam in the public sphere is being contested. The feminist project is an ongoing one playing a crucial role in eliminating inequalities, discrimination and oppression against women in Europe and the rest of the globe. However the goal of removing oppressive practices against women cannot be furthered by deflecting Western female inequalities and judging Muslim women who wear the hijab or the veil by benchmarking them with liberal values and mores. Too much covering or not enough covering of the body equally leads to gratification by the male gaze and in both cases the woman becomes the object. Therefore it is not appropriate to claim that voluntarily wearing short skirts, high heels and cosmetics is liberatory whilst pronouncing veiling is oppressive. Similarly it is equally questionable for Muslim women who veil to argue it deflects the male gaze and thus liberates their bodies from being sexualised when they become the object of the gaze of non-Muslim men in Europe and become a source of negative stereotypes against non- veiled Muslim women as immodest.

There are dual essentialisms at play when supporters of veiling allege Orientalism whenever challenges to veiling are made by those from other cultures. For those who question why Muslim women’s modesty troubles those who do not veil, then just because there is a rebuttal argument against some Western modes of female dressing does not mean that their opposition to oppressive practices of other cultures is wrong. Highlighting such issues affecting women is a means of drawing attention to discriminatory practices, which is needed to inform

¹¹⁸⁴ Laura Kacere, ‘Western Feminism and the Burqa’ (2012)
<<http://community.feministing.com/2012/09/02/western-feminism-and-the-burqa/>> accessed 20 December 2014

public policies and resultant laws to help eliminate them. However if veiling is what some feminists want to save Muslim from then a natural question is what form of modesty do they want them to adopt having been saved from their version of it? This approach fails to take account of differences among women of other cultures and is premised on cultural hegemony and such standpoints contribute to non- recognition of the lived realities of other women, which if considered would highlight that veiling is full of multiplicities and a failure to factor this into the discourse leads to the silencing of Muslim women who wear the hijab or the veil as it ignores their subjectivities.

Whilst the dominant discourses engage in oppositional perspectives of the oppression versus emancipation dichotomisation of veiling, some contemporary and nuanced internal debates on veiling amongst Muslim women are being lost. For example some Muslim women whilst dressing modestly using the hijab are also using it as a form of adornment due to the bright colours, different styles of wearing it and combining it with Western clothes. Other Muslim women who have a more conservative interpretation of what the hijab should be are of the opinion that this aestheticisation of the hijab or wearing the veil with very heavy eye make-up is against the essence of what Islamic modesty should represent as that attracts the male gaze rather than deflect it. Thus generational issues exist between the younger girls adopting the hijab that also crosses over as a fashion item combined with the tight jeans, whereas the more traditional Muslim women object and consider the accultured hijab as un-Islamic, as their idea of modesty is based on the more conservatist black hijab worn over traditional clothes.

The consequence in terms of limitations on women who veil is different, the younger generation of Muslim women are making choices in relation to what they deem appropriate by wearing the hijab of varying colours, designs and methods enabling them to express their identity in different ways and entering education and employment, without any resultant loss of freedom. Whilst for the older generation of Muslim women the traditional hijab is tied up with patriarchy and the role of the woman confined to the home. Such internal generational debates amongst Muslim women show that veiling and modesty in Islam has become socially constructed and depends on an individual's interpretation of the concept, where the prohibition for the older generation may not have severe consequences in terms of their understanding of the practice, it could have crippling effects on the younger women. This demonstrates the importance of listening to those who veil and moving away from oppositional stances, which blur some of the more pertinent issues amongst those at the centre of the debate.

There are Muslim women who wear the hijab in response to imposed modesty codes and family honour and patriarchy, similarly there are those who believe full face veiling is a religious mandate even though some Muslim scholars are of the opinion it is cultural symbol only with no religious obligation. Furthermore some Muslim feminists have been striving to penetrate the male power structures who consider themselves as holders and guardians of religious knowledge to propagate alternative meanings of the sacred texts, which question the compulsory nature of veiling. Indeed individuals are entitled to adopt particular views on religious doctrine especially since there is no real consensus among Muslims or religious scholars whether full face veiling is compulsory or not, as individuals are entitled to have their own convictions but the starting point is about having different options to choose from.

A refusal therefore to acknowledge that some Muslim women who veil are victims of patriarchy and cultural impositions is also a refusal to listen to those whose voices are important to the debate. Similarly claims of the veil being emancipatory based on women having access to public spaces is also questionable and suggests that such women lack the initial freedom to enter public spaces without any covering and therefore oppressive as the choice to enter public spaces with a veil is no choice if it is not allowing the option to enter the same spaces without the veil. Additionally, arguments advanced on the grounds of veiling as a sign of modesty perpetuates the negative stereotype held by those who support veiling that those Muslim women who do not wear the hijab or the veil by default must be immodest, especially since both discourses are lacking the voices of those Muslim women who do not veil. The key to achieving a better understanding of veiling is for both standpoints to acknowledge their respective weaknesses and strengths of the other and instead of a head on opposition, let the discourses on veiling incorporate some objective truths by listening to the voices of those who live the veiling experience.

Weaknesses of the false consciousness argument

Muslim women's choice to veil is frequently challenged by the discourse that opposes veiling by invoking the false consciousness argument, but this refusal to acknowledge veiled women as agentic subjects devalues these women's authenticity of choices and is open to a number of criticisms. First of all the false consciousness argument could apply to many situations where women make choices, for example a woman may choose to wear a short skirt because that is what she prefers to wear, but the false consciousness reasoning would attribute that not to her authentic choice but to the male dominated society, which has conditioned her to want to wear clothes that pleases men and benefits them. Similarly the same reasoning can apply to make-up, hairstyles the way she walks and postures herself. Secondly there are simply too

many reasons why women veil and under the false consciousness arguments, these women's own motivations, opinions, desires and experiences such as the use of patriarchal bargaining as a method of accessing options normally out of reach are ignored leading to a rejection of their agency as it is assumed these are merely by-products of patriarchy, despite their individualities.

Thirdly and more importantly those who argue that veiled women suffer from false consciousness are mistakenly holding themselves as being privy to the real truth which the veiled objects are not. Thus the women who veil having already been silenced by male religious scholars taking advantage of social power structures and acting as the holders of true knowledge of the sacred texts are now being subjected to the same self-serving power dynamics resulting in being silenced by the socio-feministic discourse. This indicates an adoption of the paternalistic view where the proponents of false consciousness claim the privileged position of understanding and judging complex power relationships whilst ignoring the realities of the world, where freedom and autonomy are always influenced by the context within which people live in as demonstrated by some narratives in this thesis of the women who veil. This is a problematic aspect of the false consciousness argument as veiled women are marginalised, whilst those invoking the argument are designating themselves as the liberated. This can be challenged on the grounds that those women who wear low cut dresses, short skirts or a bikini are not exercising their free choice either, as they have internalised male expectations. Thus they do not wear those garments as free agents but as a result of objectification that pleases the male gaze. It could be argued that some of those who oppose veiling are using the false consciousness argument as a mirror of the colonialist image where the Western women legitimise their moral authority to speak on behalf of women of other cultures as if the others were victimised and had no voice of their own. The problem here is that in doing this they are applying a much stricter and a different standard when interpreting freedom and autonomy to cultures other than their own.

The pervasiveness of negative stereotypes associated with veiling

There are negative and positive stereotypes that have been employed in the socio-feministic discourses on veiling but they have not been confined to those debates as they have also penetrated judicial reasoning of the ECtHR. Judges have made inappropriate comments relating to veiling and the legitimacy of religious beliefs held by women who veil despite that being an area, which the judges should not engage in. In both *Dahlab* and *Sahin* the court pronounced the hijab as a symbol of gender inequality and one that is irreconcilable with

tolerance and respect for others¹¹⁸⁵ adopting the two common negative stereotypes; that the hijab expresses or propagates fundamentalism and women who wear it are victims of oppression. The ECtHR proceeding on the basis that the hijab has a proselytising effect on children in *Dahlab*¹¹⁸⁶ and adult students in higher education in *Sahin*¹¹⁸⁷, whilst against the state it was considered a symbol inciting public disorder and intolerance of equality and neutrality. Such an inappropriate approach by the court goes against the spirit of the ECHR and although the employment of such negative stereotypes could be sounded in political debates and the media, but for the court to adopt them forming the basis of its legal reasoning goes against the grain of human rights protection, which the applicants in both cases were seeking from the law.

The ECtHR also adopted the second stereotype that associates Muslim women's veiling with oppression but failing to note the contradiction between the two, on the one hand the woman who veils is seen as an activist with fundamentalist agendas yet on the other she is seen as a victim of patriarchy and in need of saving even though there was no evidence of either. If the court had listened to the voices of the two applicants it would have found that they fall into neither of the two generalisations and were an example of two young women who were far from oppressed and their choice to wear the hijab was a personal and an unfettered one. However instead the court placed more reliance on the Federal court's assessment of the situation in *Dahlab*, whilst in *Sahin* the Turkish constitutional court's assessment had the judicial influence, the effect of both was that the legitimacy of the hijab was erased and the applicants at the centre of the issue were silenced. This resulted in a loss of opportunity not only to understanding the issue of veiling but also of recognising and giving effect to the applicants' right to religious freedom, which would have countered the harm of the stereotypes they were inscribed with.

S.A.S. and the emergence of a new label for women who veil

*S.A.S. v. France*¹¹⁸⁸ was an opportunity for the ECtHR to correct its previous deficiencies when dealing with the issue of the hijab in *Dahlab* and in *Sahin* with an opportunity to settle some of the socio-feministic standpoints on veiling as well as the lack of consistency in the application of the Convention principles such as the margin of appreciation and the proportionality doctrine. It should also have been an occasion to facilitate a better understanding of the

¹¹⁸⁵ *Leyla Sahin v. Turkey [GC]*, supra (n 28) para 115

¹¹⁸⁶ *Dahlab v. Switzerland*, supra (n 27)

¹¹⁸⁷ *Leyla Sahin v. Turkey [GC]*, supra (n 28)

¹¹⁸⁸ *S.A.S. v. France [GC]*, supra (n 29)

Muslim veil through a sociological perspective of the symbol just as the court did with the position of the Christian wooden crosses in state schools in Italy in the *Lautsi* case¹¹⁸⁹ and provide reasoned justifications for its decision. Regrettably the court fell short of such expectations, although it took an important step in the right direction by recognising that the gender inequality argument can be discounted if the applicant asserts that she veiled through her own free choice. But the GC in *S.A.S.* in upholding the prohibition on full face veiling effectively recognised and accepted the French government's argument that veiling breaches the rights of others to live in a place of socialisation, which makes 'living together' easier and that this was a choice of the French majority society. This is the first time the ECtHR has ever recognised such a right, although barriers to social interaction may interfere with living together but for such an hypothesis to evolve into a right in the opinion of the dissenting judges is a sacrifice of concrete individual rights to abstract principles that are far-fetched.¹¹⁹⁰

According to one national judge such creative interpretations are contrary to the Vienna Convention of 1969 on the Law of Treaties,¹¹⁹¹ but even if that was indeed a right then as the dissenting judges noted, people have the right not to socialise with anyone in other words as they said a 'right to be an outsider'.¹¹⁹² If the French society cannot socialise with Muslim women who veil in the public sphere as it is the choice of society then those women who veil have a reciprocal right to choose who they wish to socialise with too. Rights are about choices people make irrespective of how unpopular they may be with the majority, it wasn't that long ago that homosexuality was a considered worthy of punishment by criminal laws. Choice is not just about burqas or the face veil being oppressive as some argue, it is also about other things such as expression and clothing too.

Even if the right to socialisation and to be an outsider existed, the ECtHR has ignored the voices of those women who veil and have expressed concerns that post the ban on full face concealment they do not leave their homes, which has led them being isolated. Furthermore aggression against them has increased as the Human Rights Centre of Ghent University who as an intervening party in *S.A.S.* presented in their submission based on research on the effects of face veil bans in Belgium. Similarly the Open Foundation Society report clearly showed that the

¹¹⁸⁹ *Lautsi and Others v. Italy [GC]*, supra (n 828)

¹¹⁹⁰ *S.A.S. v. France [GC]*, supra (n 29) dissenting judgement paras 1- 2, 5

¹¹⁹¹ Owen Bowcott, 'Senior Judge: European court of human rights undermining democratic process' *The Guardian* (28 November 2013) <<http://www.theguardian.com/law/2013/nov/28/european-court-of-human-rights>> accessed 24 August 2015

¹¹⁹² *S.A.S. v. France [GC]*, supra (n 29) dissenting judgement para 8

women who veil after the ban are now less sociable¹¹⁹³ and the court in *S.A.S.* itself noted that ‘The ban may have the effect of isolating [full-veil wearers] and restricting their autonomy...’¹¹⁹⁴ The evidence makes it clear the French ban does not further any right to live in a space of socialisation that makes living together easier, if anything it has now made it more difficult because women who wear the veil have been removed from the public sphere, and this interferes with the novel principle of living together. Therefore the ECtHR has ended up endorsing a method, which instead of furthering or securing the rights of others, it inhibits those rights or the stated aim of promoting living together by the French state.

Although the gender equality argument was put to rest and proselytism was not an issue, the veil in *S.A.S.* was still being perceived as an intolerant symbol of French values just as the hijab was in *Dahlab*¹¹⁹⁵ and *Sahin*¹¹⁹⁶ even though not described as a symbol of political Islam by the court, it still clashes with French values, which is reminiscent of the clash of civilisations rhetoric. People do not have to like the veil to tolerate it, civility appears to be trumping religious rights even though the full face veil does not attack the majority religion in France or anywhere else, yet the majority’s social dislike limits religious rights. True freedom can only be secured when society allows the minority to manifest the beliefs, of which the majority disapproves. France’s attempt to treat all its citizens alike in terms of everyone being French first but those who are religious and wish to manifest their belief by veiling are being marginalised in their own society and community by not allowing them to dress as they wish. This makes the public sphere burdensome, unfair and unequal for women who veil, which leads to resentment and is not the civility of living together. The whole essence of human rights is tailored to protect those who might suffer from the tyranny of the majority and the fact that these women are in a small minority demands that they should be afforded the same rights as the majority and at the same time they are identified with the French nation of which they are citizens.

Yet, there is a part of the ECtHR reasoning in *S.A.S.*, which should be welcomed as it is a sign of a real positive development in terms of elimination of some of the negative stereotypes associated with women who veil. The court in this case dismissed the argument that women who veil are victims of gender inequality irrespective of the presence of choice. The court acknowledged in *S.A.S.* those women who veil through their own choice and the issue of any

¹¹⁹³ Foundations, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France*, supra (n 994) 44

¹¹⁹⁴ *S.A.S. v. France* [GC] para 146

¹¹⁹⁵ *Dahlab v. Switzerland*, supra (n 27)

¹¹⁹⁶ *Leyla Sahin v. Turkey* [GC], supra (n 28)

links between veiling and Islamic fundamentalism was not raised by France or the court by its own volition. However, both the state and the court in asserting that full face veiling can be prohibited legally on the grounds that it affects the rights and freedoms of others as it breaches the principle of 'living together' have replaced the gender oppression stereotype with the imposition of a different but equally negative label on the Muslim woman who veils; that by veiling, the Muslim woman refuses social interaction and opts for isolation from the rest of society. The emergence of such a connotation, which is based on stereotypical assumptions made by the court and France, is also apparent from the report on the draft resolution that was proposed on the law prohibiting the concealment of the face as the following extract shows:

The evidence we have gathered during our hearings show also the difficulties and the deep unease felt by people who everyday are in contact with the public...Barbarity is growing. Violence and threats are frequent...This is not acceptable, and each time such an attack takes place it is our living together based on the Spirit of Enlightenment that is violated.¹¹⁹⁷

The tone of such language and the link between the assumption that veiled women are subjugated and subjected to violence from their husbands in order to gain control over them are clearly not based on any substantive evidence. This is especially so considering the authorities only interviewed one veiled woman during the proposals for the new law,¹¹⁹⁸ which was no better than the Stasi Commission who during the French Headscarf Affair in state schools only gathered evidence from one Muslim woman. Furthermore such assumptions are in contradiction to the available evidence that presents a contrary picture. John Bowen an American anthropologist who was asked by the French government to testify before the French Parliamentary Commission, when it was investigating the possibility of prohibiting full face veiling had collected evidence that there were no indications of forced veiling or any oppressive practices associated. Although he acknowledged the difficulty of finding women who had been forced to veil and were willing to be interviewed¹¹⁹⁹ which is something also observed by Brems in her qualitative study on the insider realities of veil wearers.¹²⁰⁰ The results from these qualitative studies formed part of the written submissions on behalf of the

¹¹⁹⁷ Cited in Mancini and Rosenfeld, 'Unveiling the Limits of Tolerance', supra (n 833) 176

¹¹⁹⁸ Brems and others, *The Belgian 'Burqa Ban' Confronted with Insider Realities*, supra (n 996)

¹¹⁹⁹ Hillary Black, 'France asks Anthropologist to testify on Burqa debate' *Student Life* (25 September 2009) <<http://www.studlife.com/news/2009/09/25/france-asks-anthropologist-to-testify-on-burqa-debate/>> accessed 6 March 2014

¹²⁰⁰ Brems, *The Experiences of Face Veil Wearers in Europe and the Law*, supra (n 572)

Human Rights Centre of Ghent University, one of the interveners in the action in *S.A.S.*¹²⁰¹ The women interviewed as part of the research clearly indicate that they veil as a matter of free choice and this is further affirmed by a more recent qualitative research carried out in the United Kingdom.¹²⁰² The research also highlights that Islam prohibits compulsion and many women participating in the research stated that they enjoy full interactive lives, without the veil hindering communication or social participation. Thus blanket bans simply re-inforce negative stereotypes related to veiling and were based on erroneous assumptions in the context of moral panics.

The French law does not protect veiled woman from any coercion in private places and it would be unjust to prohibit those who voluntarily veil in order to demonstrate tokenistic protection of those who are forced to do so. If protection from coerced veiling was the aim behind the French law, then that could have been achieved by criminalising forced veiling, rather than criminalising the victim of the forced veiling as well as curbing the autonomy of those who veil through their own free choice.

Gender stereotypes were considered by the Grand Chamber in *Konstantin Markin v. Russia*, a case concerning discriminatory treatment against a male member of the military who was denied parental leave whilst females were allowed. In the case the GC stated that stereotypes must not influence discriminatory treatment 'The Court agrees with the Chamber that gender stereotypes, such as the perception of women... cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment...'¹²⁰³ It is unfortunate the ECtHR failed to heed by the same principles when the matter before it involved Muslim veiling.

The major criticism of the *S.A.S.* judgement is that the court found that the prohibition of the veil was necessary to pursue the legitimate aim of securing the protection of the rights and freedoms of others by ensuring 'respect for the minimum requirements of life in society' or as the government put it 'living together' and because the face individualises a person, hiding the face broke this social requirement. Not only was this the first time such a right had been asserted but such an extension of the legitimate rights of others was unprecedented. The court upheld the prohibition on veiling without specifically stating who are the others? Are they the

¹²⁰¹ *S.A.S. v. France [GC]*, supra (n 29)

¹²⁰² Foundations, *Behind the Veil: Why 122 women Choose to Wear the Full Face Veil in Britain* supra (n 1178) 26

¹²⁰³ *Konstantin Markin v. Russia [GC]* App no 30078/06, (22 March 2012)

young or old or both? Are Muslims included? Does it include Muslim women who veil or are un-veiled? Does it include only those who disagree with the veil? The court's failure to address these important questions effectively limits any attempt at understanding the deeper reasoning by the court and leaves the principle of certainty and transparency of the judgement fractured and reminiscent of the approach the ECtHR took in *Sahin*. Similarly as the court effectively allowed the creation of a new right of 'living together', it would be expected that the court would have stated what are the conditions for living together? And who decides these conditions? But the court failed to state that and effectively left the matter for others to second guess the meaning of the legitimate aim of 'living together', which is regrettable for a court upholding a novel aim at the expense of limiting religious freedom considered a fundamental right by the ECHR, which the court itself acknowledged would place veiled women with a dilemma 'Either they comply with the ban and thus refrain from dressing in accordance with their approach to religion; or they refuse to comply and face prosecution'.¹²⁰⁴

Inconsistent margin of appreciation and proportionality in veiling cases

The margin of appreciation doctrine is a vital tool that enables uniformity in human rights protection afforded to citizens of signatory states whilst allowing the ECtHR to take into account of prevalent domestic and European conditions when interpreting the Convention. The doctrine was developed to allow the Commission and the ECtHR to exercise a supervisory jurisdiction over state interference with an individual's Convention rights, but the doctrine is riddled with inconsistencies and nowhere is this more apparent than the hijab and veiling cases decided by the ECtHR. The availability of concepts such as consensus and proportionality to the court ought to have injected some certainty into the application of the doctrine; certainty being an important interpretive principle developed under the Convention. But the same concepts have been used by the court to the detriment of those who veil without adequate judicial discussion. In both *Sahin* and *S.A.S.* there has been a failure by the court to offer an adequate analysis of the balancing exercise used by the court in holding the prohibitive measures proportionate. At the same time the court appears to have reached an erroneous conclusion on the existence of a European consensus on prohibiting veiling in public spaces. France and Belgium are the only two states with national bans on full face veiling and for the court to treat that as a European wide consensus is clearly wrong and the court inferring consensus from mere debates on veiling is a highly questionable approach to establishing the existence of a consensus. Majority of the European states do not have legal

¹²⁰⁴ *S.A.S. v. France [GC]*, supra (n 29) para 57

prohibitions on the face veil in public spaces, which means there is consensus on non-prohibition of veils in public spaces in Europe, thus the margin of appreciation should have been narrower with greater judicial scrutiny, instead of the wide margin deferred to France.

The ECtHR in *S.A.S.* highlighted the factors that make the prohibitory French law disproportionate yet the court reached an inverse conclusion, leaving the supervisory power of the court questionable and it is suggested that the ECtHR has hidden behind the margin of appreciation doctrine allowing the rights of veil wearers to be interfered with without the protection of their rights as guaranteed by the Convention. Despite the ECtHR asserting many times that the margin of appreciation is not unlimited; it appears that in the adjudication of veiling cases the court failed to follow its own legal pronouncement. In both *Sahin* and *S.A.S.* the prohibitions on hijab in universities and the veil in all public spaces by Turkey and France respectively was an imposition of their own preferred version of Islam because both states are forcing Muslim women who want to attend universities and be in public spaces to either choose their desired form of religious dress or one preferred by the state, which in the French case would leave the face visible and in the Turkish case leave the hair visible. In both cases there is punishment being meted for these women for holding and exercising their religious beliefs in the sense that in Turkey a Muslim hijab wearing woman could never attend university and in France a veiled woman could never step outside of her home with the veil without breaching criminal laws. In both cases the court by focussing on general interests such as public order and rights of others in *Sahin* and the notion of living together in *S.A.S.* as opposed to a focus on the individual rights of the applicants was already primed against listening to the voices of the women in question.

The importance of human rights demands consistency and clarity in application of the ECHR but both are missing when the matter before the ECtHR is one concerning the hijab or the Muslim veil. Legitimate aims are subject to the proportionality requirement whereas the lack of clarity on the aim of the French law is problematic as it makes determination of whether the ban is proportional or not difficult. This lack of consistency appears to be prevalent in cases involving veiling, for example the balancing test used for proportionality analysis is too ambiguous and the ECtHR in *Dahlab*, *Sahin* and *S.A.S.* failed to determine or say what standard of measure was used for the proportionality analysis, which led to inconsistencies in the decisions. An example of this can be seen in the Ahmet Arslan¹²⁰⁵ case where the court stated that as the applicants were simply wearing religious clothes in public and they did not intend

¹²⁰⁵ *Ahmet Arslan and Others v. Turkey*, supra (n 769)

any threat on others and that the state should not interfere with such rights unless there are ramifications for others. Yet in *S.A.S.* the court upheld the prohibition on the veil in the absence of any evidence of the veil's threatening effects on others. The meanings of the Islamic veil does an can have one meaning for the wearer yet a different one for the perceiver and how such meanings are decoded by the wearer and the perceiver could only be understood if an applicant's subjectivities are taken into account and the harmful effects of stereotyping the practice are acknowledged. However to date the ECtHR has never probed into the different meanings and how they are subject to change due to the situational and contextual settings, had the court listened to the voices of those who veil by engaging in that enquiry the outcome of *Dahlab*, *Sahin* and *S.A.S.* may well have been different.

The failure of the ECtHR to listen to veiled women's voices

The ECtHR when adjudicating on the legality of prohibiting Muslim religious symbols has frequently relied on the margin of appreciation doctrine when interpreting the hijab as a symbol, which clashes with Western values.¹²⁰⁶ This adjudication process has elements of being perception-based and defers to stereotypes without listening to the voices of the veiled that would have highlight the multiple meanings of the hijab and the veil, a sentiment shared by Judge Tulkens who reminded the majority in her dissenting judgement in *Sahin*:

Wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.¹²⁰⁷

In this respect Marshall notes that human rights law can act as an enabling mechanism as opposed to restricting one's choice formation by listening to the voices of particular individuals. For her, individual identities are linked with how others perceive and relate to individuals and any disrespect or unjust treatment due to limitations on the fluidity of identity restricts, instead of enabling individuals to pursue their achievement of the goals related to the self. In order to change this and enable such individuals to be who they want to be warrants 'Listening to those people, taking their participation and voices seriously...'¹²⁰⁸

¹²⁰⁶ Mancini and Rosenfeld, 'Unveiling the Limits of Tolerance', supra (n 833) 171

¹²⁰⁷ *Leyla Sahin v. Turkey [GC]*, supra (n 28) Tulkens dissenting judgement para 11

¹²⁰⁸ Marshall, *Human Rights Law and Personal Identity*, supra (n 198) 239

Human rights must recognise that individuals need to be allowed to choose their own ways of living with the law creating conditions that facilitate such freedoms. Women who veil do so for a number of different reasons ranging from Islamic modesty to experimenting with different identity formations such as a modest woman, a spiritual woman, someone who resists forced unveiling, an emancipated woman, someone who resists the traps of modernity and someone who can choose when and how to veil. If the court has given recognition to the choices of those who engaged in consensual homosexual activities behind closed doors¹²⁰⁹ and those who wish to change their gender identity¹²¹⁰ and rightly so, then the same court must allow Muslim women who veil, enabling conditions, instead of creating barriers to their own way of choosing how to live and choosing identities to form at different times of their lives.

Bans on veiling are the clearest constraint on Muslim women's choice of how they want to live and create their identity. Stripping them of these choices using criminal laws as a means of removing their religious clothing can hardly be conducive to the promotion of their freedom, autonomy, self-esteem or self-respect. In contrast there are Muslim women such as Fereshte who question the use of the veil as a means of identity formation and argues that the veil erases a woman's identity completely and the face veil is an absurd form of modesty since it removes a woman's presence from the public sphere and it makes life more difficult and dangerous for other women.¹²¹¹ For Fereshte the women who veil have an impact on how women who do not veil are treated and for her the distinction between the individual identity and religious or group identity are distinct with assertions of group identity having a negative impact on the personal. Her comments are also important as they demonstrate that negative views on veiling are not the sole confines of the non-Muslims; some Muslim women disagree with veiling in public spaces too and their voices also need to be factored.

Wearing the veil may demonstrate hostility to Western traditions but that is not a ground for prohibiting it, otherwise plurality of cultures and freedom of expression will disappear from the public space, therefore it is better to have veiled Muslim women in public spaces than not to have them there at all. Diversity and expression through clothing is an indication of a healthy democracy but using the law to regulate such practices is inadequate as law is too

¹²⁰⁹ *Dudgeon v. United Kingdom*, supra (n 1069)

¹²¹⁰ *Christine Goodwin v. United Kingdom [GC]*, supra (n 1070); *Van Kuck v. Germany* App no 35968/97, (12 September 2003); *Grant v. United Kingdom* App no 32570/03, (23 May 2006); *L v. Lithuania* App no 27527/03, (11 September 2007); *Schlumpf v. Switzerland* App no 29002/06, (8 January 2009)

¹²¹¹ Shirazi and Mishra, 'Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States', supra (n 290) 53

blunt and it is not readily discernible whether such practices as seen through the legal lens are considered statements of culture, religion, presence or the absence of freedom or an attack on Western society's values. Even though the applicant in *S.A.S.* affected by the ban turned to the ECHR, which champions values such as toleration, equality and broadmindedness, regrettably these values are not neutral as they themselves are tied up with European history and earlier foundations. The French state wished to ban veils in order to preserve the French identity but then the creation, change or expression of a different identity must be protected too as Marshall argues 'Human rights law's purpose is to empower individuals, recognising and protecting their identities. It should not interpret concepts within the ECHR as constraining identities'.¹²¹² Muslim women who veil should not be punished using criminal law as in France for espousal of values such as freedom, choice and identity, which are the same values the said laws are supposed to uphold, instead their identities need to be seen as representative of the community they belong to as well as entering and leaving it as individuals and not view it just in terms of their relationality.

For Muslim women to be free they must attain both positive and negative freedoms, which are ideals for every state to guarantee and If Muslim women were allowed to wear the veil as a free autonomous choice by all states in public spaces, their greater incorporation into the majority European society may be encouraged by the state's individualist and liberal role not just as a guarantor of positive liberty but also as a protector of individual choice and negative freedom. For those who have security concerns about veiling, the majority of Muslim women would and do remove the veil when required with a possibility of a real minority who act unreasonably by refusing, but with such women it has to be questioned whether the veil is a religiously motivated stance or simply a political one. Islam is not as rigid as perceived and contains ample flexibility even in those practices considered obligatory. For example the prayer in the mosque is considered the most pure and sacred with a dog being considered a dirty animal, yet Muslim scholars have agreed that a blind person can take a guide dog into a mosque.¹²¹³

The situation in the public sphere need not be full face veil or nothing and has to be a matter of balancing religious, cultural and Western values, which is precisely the pluralism, tolerance and broadmindedness the ECtHR constantly refers to, which means that the Muslim women

¹²¹² Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities', *supra* (n 262) 378

¹²¹³ 'Ruling allows guide dog in mosque' (*BBC News*, 2008)

<<http://news.bbc.co.uk/1/hi/england/leicestershire/7633623.stm>> accessed 20 December 2014

who wear the full face veil must be compromising on their part too. Indeed it is difficult to compromise values people hold onto dearly especially in matters that are religious but religion especially Islam allows for pragmatism allowing for modification of religious practice in accordance with the situational. There is no doubt that wearing the veil impedes communication in certain situations such as emergency medical situations and therefore to insist that the veil is worn unless a woman is attended by a female doctor in circumstances where one is unavailable would be unreasonable, similarly wearing the veil in school where children's educational development could be hindered is inappropriate or insisting the veil is worn in nursery schools where it is common for fathers to bring their children in and need assurance that the person they have handed over custody of their child is authentic. It is the insistence of the veil when it could reasonably be removed or its prohibition when it is not necessary that is problematic and that can only change with those who adopt strict oppositions to pay regard to the requirement of respect, tolerance and broadmindedness, thus dislike of others values should not dictate insistence on veiling or its removal. A good example of a compromise struck is in the United Kingdom where in a courtroom women are allowed to wear the veil but they must remove it while giving evidence.

When majority societies via their laws consider religious symbols such as the veil to be products of a patriarchal order, then upholding laws prohibiting such items of clothing simply offers Muslim men who impose them a psychological edge over the women, as the legal prohibition would be used as a justification to keep women out of the public sphere by not letting them out of the home unveiled. The best remedy to use for combating such gender inequality is not total prohibitions using the law as they are detrimental since they target victims as opposed to the perpetrators, but through listening to those who veil and the education of Muslim and non-Muslim members of society in a better understanding of veiling in European contexts, social values, respect and tolerance of different cultures with a clear campaign coupled with dialogue and support for Muslim women's rights. This dialogue between all concerned will enable each party to express true concerns and any misunderstandings, which may exist with the aim of settling oppositions and focussing on the realisation of religious rights, expression and autonomy. Importantly such dialogue or discussions have to be with those women who veil not just for religious reasons but all the other purposes behind the practice and incorporate the different age groups and backgrounds of those who engage in the practice.

There should be no representation on behalf of these women by Muslim men or any cultural insiders, although their views have to be received but only in their capacity as Muslim men and women. It is equally important that the views and voices of those women who do not veil or wear the hijab are incorporated into the dialogue as that is one group of Muslim women whose voice in the debate on veiling is also lacking. From a legal perspective any human rights judgement that upholds a ban if it is deemed so necessary, must contain total transparency of the justifications by the court with such justifications and principles to be applied consistently to Article 9 rights, irrespective of whether the issue is one involving religious symbols such as the hijab or the veil. This will not only address the oppressive veil but will also recognise the freely chosen veil and will help eliminate the essentialisms associated with binary discourses, leading to Muslim women's rights to dress the way they want to and respect for those rights from all members of society and will be an acknowledgement of their voice.

This thesis has demonstrated that the religious, socio-feministic and legal discourses on veiling are problematic in their approach to addressing issues surrounding women; however one certainty that has been made evident is that the veil cannot be confined to a singular meaning, context or a truth. In order to go beyond the misunderstood practice of veiling the thesis has shown that it is necessary to step beyond the half-truths, which all of the discourses discussed failed to since each discourse silenced the women who veil by failing to listen to their voices, despite these women being the real holders of the truth behind their veils. This extra step requires a wider understanding gained through the process of dialogue and communication mentioned above, which dis-entrenches cultural practices like veiling through challenging the ethnocentric yardsticks employed by those opposing or supporting the universalism of such a practice. This can only be facilitated by listening to the experiences and subjectivities of those who veil but without the essentialist standpoints or the maintenance of the stereotypes in the discourses on the matter.

To truly understand the veil does mean that when we view the practice it has to be seen as an entity that is complex and has historical, cultural and religious contexts that disallow it to be treated as a static object without variables. To treat the veil as oppressive or emancipatory would be ignoring some of the greater problems Muslim women who veil face, such as employment, equal treatment, education, forced marriage, honour based violence or female genital mutilation. Therefore to inscribe just the veil with oppression would be a denial of the multi-faceted ways in which oppression against women operates. The aim of this thesis was never to adopt a positioning on whether the veil is oppressive or not but to highlight that in

the endeavour by the discourses to force-fit the veil into a self-serving meaning of the veil leads to those women who veil to a triple bind where they are silenced by the religious discourse the socio-feministic discourse and finally when they challenge the prohibitions imposed on them, the ECtHR silences them.

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