

“I will not take off my clothes;” the application of international obligations and the wearing of the niqab in Australian courts.

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## Introduction

The protection of religious freedom in Australia recently gained attention in the matter of *R. v. Anwar Sayed*, an interlocutory decision of Her Honour Justice Deanne of the District Court of Western Australia.<sup>1</sup> The issue before the Court was whether a female born of the Islamic faith and a practicing Muslim would be required to remove her niqab when giving evidence at a trial where she was named on the back of the indictment and summonsed as a witness.<sup>2</sup> Deanne J concluded that, in the circumstances of this particular case, it was not appropriate for the witness to wear a niqab whilst giving testimony.<sup>3</sup>

There is no doubt that the wearing of distinctive clothing or head coverings is broadly recognized as a means of observing religious faith.<sup>4</sup> However, it is equally true to say that head coverings that cover the face create a problem that goes beyond recognition of another person's religious beliefs, and in some circumstances can affect the fairness of a hearing.<sup>5</sup> This issue generated surprisingly bipartisan political commentary in Australia. Colin Barnett is quoted as saying that although he defended the right of people to dress according to their faith and religion, he believed that in this case it would be appropriate for the woman to remove her niqab.<sup>6</sup> Liberal leader Tony Abbott labelled the niqab a "particularly confronting" piece of clothing.<sup>7</sup> Perhaps more surprising is the apparent agreement of former lawyer, Julia Gillard. Prime Minister Gillard said she thought it was one of the "limited" instances when it should be removed because "[t]he essence of giving witness evidence is the court is making a determination over whether or not someone is telling the truth... I think it would be impossible to do if you couldn't see someone's face."<sup>8</sup>

This paper will argue that the judgement in *Sayed* placed too great an emphasis on public perception of justice, and gave insufficient weight to international instruments in the specific circumstances of the matter. A more thorough interpretation of the International Covenant on

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<sup>1</sup> (19 August 2010), Perth 164/2010 (WADC) (*Sayed*)

<sup>2</sup> *R v Anwar Shah Wafiq Sayed*, Transcript of Proceedings at Perth, Thursday 19 August 2010 at p1040

<sup>3</sup> *Ibid* at pp1060-1

<sup>4</sup> 'Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,' Human Rights Commission of New Zealand, December 2005, p2

<sup>5</sup> For the purposes of this essay 'niqab' refers to the traditional face veil, and 'burqa' to the full body veil (usually black). The term 'hijab' has been used to refer to a variety of head coverings, not all of which cover the face, and is therefore avoided in this essay. (Definitions taken from 'Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,' Human Rights Commission of New Zealand, December 2005, p18)

<sup>6</sup> 'WA Premier Barnett weighs into burqa debate,' *Perth Now* 4 August 2010, <http://www.perthnow.com.au/news/western-australia/wa-premier-barnett-weighs-into-burqa-debate/story-e6frg13u-1225901287629>

<sup>7</sup> Aja Styles, 'Death threats in burqa court case,' *WA Today* 5 August 2010, <http://www.watoday.com.au/wa-news/death-threats-in-burqa-court-case-20100805-11g1f.html>

<sup>8</sup> 'Burqa Muslim defendant Anwar Sayed attacked near lawyer's office,' *News Limited*, 6 August 2010, <http://www.news.com.au/features/federal-election/burqa-muslim-defendant-anwar-sayed-attacked-near-lawyers-office/story-e6frllr-1225902131277>

Civil and Political Rights (**ICCPR**) and the relevant Australian precedents, taken in light of the post-*Sayed* decision in *R v NS* (Canada),<sup>9</sup> suggests that there was no conflict between the rights of the witness and the rights of the accused in this particular instance, and the witness should therefore have been permitted to give evidence in the niqab as a matter of international law.

### Relevant International Instruments

The United Nations Charter refers to religious rights,<sup>10</sup> but the Universal Declaration of Human Rights (**UDHR**) offers more significant coverage.<sup>11</sup> Article 2 of the UDHR forbids distinctions on the basis of religion, in the enjoyment of the rights and freedoms contained in the Declaration. Article 18 states:

*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 teaching, practice, worship and observance.*

The ICCPR also contains rights to freedom of thought, conscience and religion, manifestation of religion or belief and the rights of minorities to profess and practice their religion in community with others.<sup>12</sup> The right to manifest religion or belief can be limited, but only if such limitations are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.<sup>13</sup> The freedom of thought, conscience and religion cannot be derogated from. Individual autonomy and choice are critical to these rights, and they are considered violated equally by both forcing and preventing the wearing of face coverings for religious purposes.<sup>14</sup>

Also relevant for the purposes of this essay are Articles 14(1) and 14(3) of the ICCPR, which provides for the right to a fair trial, including the equality before the courts and a fair and public hearing by an independent and impartial tribunal. Article 14(3) of the ICCPR relevantly expands on the minimum guarantees that should be reliably available to an accused person. The only guarantee in relation to examining witnesses is '[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'<sup>15</sup> Thus it can be

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<sup>9</sup> 2010 ONCA 670

<sup>10</sup> See Preamble, article 1(3) and article 55(c), United Nations Charter.

<sup>11</sup> The ICCPR entered into force generally on 23 March 1976 in accordance with Art 49 and entered into force in Australia on 13 November 1980: [1980] ATS 23. Cf Arts 5 and 6 of the ECHR; Arts 7 and 8 of the American Convention on Human Rights; Arts 6 and 7 of the African (Banjul) Charter on Human and People's Rights; and Art 10 of the Universal Declaration of Human Rights.

<sup>12</sup> See articles 18 and 27, International Covenant on Civil and Political Rights.

<sup>13</sup> See article 18(3), International Covenant on Civil and Political Rights.

<sup>14</sup> Human Rights Watch *Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf* 29 June 2004, 24; 'Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,' Human Rights Commission of New Zealand, December 2005 .

<sup>15</sup> Article 14(3)(E) ICCPR

seen that manifestation of religious belief is an explicit right under international law, whereas the forced removal of the burqa to testify is not protected unless it can be shown to seriously prejudice the rights of the accused person. Thus at international law the issue hinges on the actual impact of the witness wearing a burqa while giving testimony.

### **Application of International Instruments in Australia**

Australia does not have a bill of rights, nor is there a dedicated court supervising Australian law, such as is provided by the European Court of Human Rights. There is a freedom of religion clause in s116 of the Australian Constitution, which prevents the Commonwealth from passing any law prohibiting the free exercise of any religion, but its terms are very limited by comparison to Article 18 of the ICCPR, and the limited judicial consideration it has received states that it ‘does not protect unsocial actions or actions subversive of the community itself’.<sup>16</sup> Unlike the UK, the Courts of Western Australia have no guidelines addressing the removal of veils. Therefore Australian cases present a unique opportunity to test the application of the ICCPR in regards to this matter.

First it is important to note that the principles of international law discussed earlier in this essay have not been directly and explicitly incorporated into the laws governing witness exposure in the Western Australian District Court by way of either State or Federal law, although in 2008 the Australian government launched two projects considering the potential impact of the enactment of Art 18 of the ICCPR, but neither has yet born fruit.<sup>17</sup>

However, ‘an Australian statute must be interpreted and applied, as far as its language admits, so as not to be inconsistent with established rules of international law’.<sup>18</sup> The High Court has also evinced a refusal to uphold legislation that abrogates fundamental rights, recognised by ‘civilised countries’, unless there is clear legislative intent to override those rights, expressed in unambiguous and unmistakable language.<sup>19</sup> In the absence of clear instruction in the legislation that a witness may not give evidence wearing a face covering, or otherwise proscribing the wearing of religious face veils, the existing rules regulating witness behaviour

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<sup>16</sup> Per Starke J, *Adelaide Company of Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116

<sup>17</sup> The Freedom of Religion and Belief in the 21<sup>st</sup> Century Project was launched in September 2008 by the Australian Human Rights Commission to consider a Federal Religious Freedom Act. The National Human Rights Consultation was launched in December 2008 to consider the protection and promotion of Human Rights in Australia. See Garth Blake SC, ‘God, Caesar and human rights: Freedom of religion in Australia in the 21<sup>st</sup> century,’ (2009) 31 Aust Bar Rev 279

<sup>18</sup> Kirby J, *Thomas v Mowbray* (2007) 233 CLR 307 at [379], see also *Polites v Commonwealth* (1945) 70 CLR 60 at 68–9 per Latham CJ, Dixon J at 77, and Williams J at 80–1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 ; 39 ALD 206 at 214 ; 128 ALR 353 at 362 per Mason CJ and Deane J; and *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ; 152 ALR 540 at [97] per Gummow and Hayne JJ. Note the age of this principle - O’Connor J referred to it in one of the High Court’s early cases: *Jumbunna Coal Mine NL v Victorian Coalminers’ Association* (1908) 6 CLR 309 at 363.

<sup>19</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at [379]; *Coco v The Queen* (1994) 179 CLR 427 at 437, 446; *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 492 at [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]–[20], 643 [241]

may 'be interpreted and applied in a manner consistent with established rules of international law and in a manner which accords with Australia's treaty obligations.'<sup>20</sup>

In relation to the wearing of the niqab in Australian Courts, the ICCPR should have an interpretive role to play in relation to the customary principles of justice and in relation to the limited and uniformly inspecific statutes dealing with the matter.<sup>21</sup> This strengthens the use of international precedents from New Zealand, Canada and the US.

Deanne J considered these issues in her Reasons for Decision, but concluded that in *Sayed* 'the immediate question is not the view or opinion of the court as to the respect and/or tolerance of the wearing of a particular item of clothing based on religious or cultural beliefs or reasons or a combination of such matters'.<sup>22</sup> Instead her Honour's exclusive focus was:

*whether the members of the jury as the sole judges of the facts in this case will be impeded in their ability to fully assess the reliability and credibility of the evidence of a particular witness if they are not afforded the opportunity of being able to see that witness's face when they give evidence at trial.*<sup>23</sup>

With respect, this statement is not consistent with Her Honour's comments elsewhere, as will be apparent from the analysis below. However if we take it on face value, Her Honour apparently did not consider that the answer to that question might not be absolute, and that the principles engaged to try and balance the respective interests recommended in the precedents below might be determined with reference to the ICCPR; this is consistent with her final judgement.

### **International Precedents Referred to in Sayed**

The WA Bench Book (published November 2009) directs District Court judges to consider *The Equal Treatment Bench Book (UK Bench Book)*.<sup>24</sup> Its aim is to 'inform, assist and guide, to generate thought and discussion and, ultimately, to enable all judges to deal confidently, sensitively and fairly with all those who appear before them'.<sup>25</sup> Chapter 3.3, "Religious Dress", offers specific guidance on dealing with a witness who habitually wears a face veil for religious purposes; as the WA Bench Book refers to this document it is worth considering some detail. While it suggests that in some instances 'a sensitive request to remove a veil, with no sense of obligation or pressure, may be appropriate', but that it should not be made lightly because of the potential trauma involved to the witness, and the potential

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<sup>20</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 89–92 [140]–[152]; 197 ALR 241 at 273–6; 73 ALD 609 at p641

<sup>21</sup> It is regrettable that the view of McHugh J in *Al-Kateb* is adopted by the High Court of Australia in regards to the Australian Constitution being above the use of international law in its interpretation. *Al-Kateb v Godwin* (2004) 219 CLR 562 at [64] – [66]

<sup>22</sup> *Sayed* Transcript p1058

<sup>23</sup> *Ibid*

<sup>24</sup> Judicial Services Board, United Kingdom, December 2007 available at [http://www.judiciary.gov.uk/NR/rdonlyres/BC7C1D83-4B68-44DD-A424-E4320267D4B9/0/2009\\_etbb\\_3\\_religon.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/BC7C1D83-4B68-44DD-A424-E4320267D4B9/0/2009_etbb_3_religon.pdf)

<sup>25</sup> Judiciary of England and Wales Summary, <http://www.judiciary.gov.uk/publications-and-reports/jsb-publications/equal-treatment-bench-book.htm>

for that pressure to have ‘an adverse impact on the quality of evidence given’. It emphasises that ‘while it may be more difficult in some cases to assess the evidence of a woman wearing a niqab, the experiences of judges in other cases have shown that it is often possible to do so’, and further observes that ‘[w]hilst not exact analogies, there are, of course, other circumstances in which a judge will take evidence without being able to see the face of the witness – for example, where evidence is taken on the phone, or where the judge is visually-impaired.’<sup>26</sup>

Deanne J referred to the UK Bench Book in her Reasons, but does not appear to have given any regard to international instruments in the interpretation of its provisions, such as the ICCPR. The UK Bench Book is written in the context of an additional international instrument on the protection of the rights and interests of both accused persons and witnesses which has been significant for the development of the rights of witnesses to freedom of religious dress.<sup>27</sup> One might argue that some of the principles developed by the ECHR might be applicable in the Western Australian context by way of interpreting the UK Bench Book, which would have opened significant additional jurisprudence to the Court.

### *Razamjoo*<sup>28</sup>

The issue arose in the District Court in Auckland in 2004, when two women wished to wear the burqa while giving evidence for the prosecution. The defence objected to the women giving evidence while veiled on two key grounds. Firstly, the defence cited the defendant’s fair trial rights; to allow the witnesses to remain veiled, it was argued, would prevent both the defence and the trier of fact from assessing facial demeanour during cross. Unlike in the Western Australian context, defence was able to cite s25(f) of the *Bill Of Rights Act 1990 (BORA)*, which provides that those charged with an offence have the right to ‘examine the witness for the prosecution and to obtain the attendance and examination of the witnesses for the defence under the same conditions as the prosecution,’ however Griffith’s discussion tends to suggest that this legislation does not provide a right of confrontation between the accused and accusers, and probably does not do much more than Australian legislation to further this objective.<sup>29</sup> Secondly, the defence argued that the wearing of the face veils was not compulsory under Islamic law, and that therefore the two women should not be able to avail themselves of human rights protections for religious belief under ss13, 15, 19 and 20 of BORA.<sup>30</sup>

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<sup>26</sup>“Religious Dress”, Chapter 3.3 of *The Equal Treatment Bench Book*, Judicial Services Board, United Kingdom, December 2007, [http://www.judiciary.gov.uk/NR/rdonlyres/BC7C1D83-4B68-44DD-A424-E4320267D4B9/0/2009\\_etbb\\_3\\_religion.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/BC7C1D83-4B68-44DD-A424-E4320267D4B9/0/2009_etbb_3_religion.pdf)

<sup>27</sup> Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (2001) Oxford University Press, New York

<sup>28</sup> *Police v Razamjoo* [2005] DCR 408

<sup>29</sup> David Griffiths (2006) ‘Pluralism and the Law: New Zealand Accommodates the Burqa,’ 11 *Otago Law Review* 281 p6

<sup>30</sup> Section 13 BORA encompasses the right to freedom of thought, conscience and belief; ss 15 and 20, the right to manifest their religion in practice and in public; and s 19, the right to freedom from discrimination on the grounds of their belief.

Thus *Razmajoo* ostensibly revolved around a conflict between the natural justice rights of an accused person, and the religious freedoms of a witness, and the conflict gave rise to the same panoply of issues that were dealt with in the Australian context. ‘Is New Zealand a secular society with a correspondingly religion-free court system? Does Islam truly require women to wear veils? Is it possible to preserve the right of a defendant to a fair trial while also giving effect to the right of others to practise their religion? In order to "examine" a witness is it necessary to see the whole face of a witness?’<sup>31</sup> As in Australia, Media and political reactions favoured protecting the defendant's rights ahead of Mrs Salim's and Ms Razamjoo's request to wear the burqa, with many suggesting that if the two women did not like New Zealand's laws regarding testimony in court, they should leave the country.<sup>32</sup>

However, buried beneath the surface of the arguments lurked another concern. Judge Moore noted that ‘focus on the concept of a fair trial as being one which enables the decision maker to reach a fair result cannot blind the Court to wider considerations.’<sup>33</sup> In this context he added that it is ‘of vital importance that Courts go about their business in ways which entitle them to the confidence of the public.’ Strikingly, Judge Moore went on to say explicitly that ‘a sense of what is acceptable as fair process by the community generally has to be kept in mind.’ It appears that a third critical issue was identified. In addition to the rights of the accused and the rights of the witness, there are also community expectations to appease. It was a decisive issue in New Zealand. Although the two women were allowed to wear a head scarf, they were ordered to remove their face coverings. They were, however, allowed to give evidence from behind a screen, and were visible only to the judge and counsel (as well as female court staff).<sup>34</sup>

Counsel for the prosecution in Sayed argued that Razmajoo could be distinguished by the centrality and gravity of the evidence that the witnesses were called on to provide in Razmajoo. However, Deanne J observed in response that the exact nature and importance of a witness’ evidence could not be determined until it was given and that the fact that the witness in Sayed was said to be giving relatively peripheral and uncontentious evidence could not be relied upon, given that she would make ‘observations that are relevant to the two charges’ and ‘no doubt her observations will be the subject of some cross-examination’.<sup>35</sup> As one wonders when a witness would ever be called to make observations that are not relevant to the charges, it appears that Deanne J is arguing that in all cases where cross-examination is expected the test of importance from the UK Bench Book will weigh in favour of the accused rather than the witness.

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<sup>31</sup> David Griffiths (2006) ‘Pluralism and the Law: New Zealand Accommodates the Burqa,’ 11 Otago Law Review 281 p6

<sup>32</sup> *ibid*

<sup>33</sup> Quoted in ‘Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,’ Human Rights Commission of New Zealand, December 2005 p13

<sup>34</sup> *Police v Razamjoo* [2005] DCR 408 (**Razmajoo**)

<sup>35</sup> Sayed Transcript at p 1049

The District Court in Perth also had the benefit of submissions made to the Ontario Court of Appeal in the matter of *The Queen v NS and Others* although at the date of the *Sayed* hearing the Ontario Court had not yet handed down its judgment and the WA District Court was reliant on a submission made by the Canadian Civil Liberties Association.<sup>37</sup> The Muslim complainant ('NS') habitually wears a niqab in the presence of all men who are not her family members. At the preliminary enquiry for sexual assault charges the accused sought orders that NS be compelled to remove the niqab while testifying in open court, contending that the constitutional right to make full answer and defence requires that he, his counsel and the preliminary inquiry judge be able to see the accuser's face when she testifies and, in particular, when she is cross-examined. It is an important test case for this matter because of the seriousness of the charges and the accusatory nature of NS's role in the proceedings. However, Deanne J noted that it can again be distinguished from the Australian context by the presence of a constitutionally embedded human rights instrument in Canada.<sup>38</sup>

In their submissions, the Canadian Civil Liberties Association (CCLA) argued that the matter hinged on 'the important issue of defining the proper scope of the right to a fair trial vis-à-vis a witness' right to observe his or her religious rules and preferences.'<sup>39</sup> The right to a fair trial, in this context, was distinguished from 'the rights of the accused', and was said by the CCLA to generally exclude permitting a defendant to prescribe how a witness may be dressed.<sup>40</sup> The CCLA argued that there was no real and substantial risk to trial fairness because: (i) allowing a witness to testify with her niqab facilitates the elicitation of truth and promotes trial fairness; (ii) a niqab does not hinder defense counsel's ability to conduct a rigorous and thorough cross examination; and (iii) demeanour in general and particularly facial expressions which are not observable as a result of wearing a niqab are not reliable indicators of credibility.<sup>41</sup> Although this follows the framework laid out by the Canadian Supreme Court in *Dagenais*<sup>42</sup> and *Mentuck*<sup>43</sup>, which do not create a binding precedent in WA, there is much to be recommended in this approach to the issue.

## **Canadian Principles Applied to *Sayed***

### **1. Is wearing a niqab "religious practice"?**

Deanne J considered the view of the witness, as presented by counsel for the prosecution, that the wearing of the niqab was not obligatory for all Muslim women, but that there was an

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<sup>36</sup> *The Queen v NS and Others*, (2010) Court of Appeal for Ontario, Court File C50534

<sup>37</sup> 'Factum of the Canadian Civil Liberties Association,' *The Queen v NS and Others*, (2010) Court of Appeal for Ontario, Court File C50534

<sup>38</sup> The *Canadian Charter of Rights and Freedoms*, comprising Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK).

<sup>39</sup> 'Factum of the Canadian Civil Liberties Association,' *The Queen v NS and Others*, (2010) Court of Appeal for Ontario, Court File C50534 p1

<sup>40</sup> 'Factum of the Canadian Civil Liberties Association,' *The Queen v NS and Others*, (2010) Court of Appeal for Ontario, Court File C50534 p3

<sup>41</sup> *ibid*

<sup>42</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835

<sup>43</sup> *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442

element of personal choice involved; her Honour concluded that ‘there exists what might be described as an aspect of personal preference, doubtless strongly and validly held, in the wearing of the niqab in the case of this particular witness.’<sup>44</sup> It was also noted that the witness removed her niqab for driver’s license photographs.

The decision to practice veiling is much debated across the Muslim world.<sup>45</sup> Islamic society requires a degree of modesty from both men and women that is largely unfamiliar to Western cultures, though only women wear face veils.<sup>46</sup> Both traditional and more contemporary forms of appropriate dress are based on the general understanding of modesty deriving from the Hadith<sup>47</sup> and Islamic tradition; it is generally agreed that the degree of modesty to be assumed is affected by the relationship of the wearer with those present, and the gender mix of the group.<sup>48</sup> Beyond that core of agreement, there is room for interpretation and/or choice. Neither the relevant portions of the Qur’an, nor the corresponding Hadith are indisputably explicit that Muslim women must cover their faces.<sup>49</sup> In different Muslim cultures the same verses of the Qur’an are used as authority for very different veiling practices.<sup>50</sup> Social class or regional background can impact whether a woman feels obliged to wear a niqab on religious grounds, but the decision can also be compelled by political conviction, cultural practice, or as a means of avoidance of male criticism and harassment.<sup>51</sup>

The international jurisprudence is inconsistent in its manner of determining whether a religious practice warrants protection, especially where it conflicts with rights that are regarded as fundamental to another person. The European Convention on Human Rights’ protection of manifestation of religious belief<sup>52</sup> has been held to cover only those practices that have a very direct link to the religion in question and not those that are merely “motivated or influenced by a religion or a belief”.<sup>53</sup> In practice this has meant that the Court has attempted to detect a degree of compulsion in the religious activity, and to apply a ‘necessity’ test to the question of which religious practices warrant protection.<sup>54</sup> The Court

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<sup>44</sup> *v Anwar Shah Wafiq Sayed*, Transcript of Proceedings at Perth, Thursday 19 August 2010 at p1044

<sup>45</sup> P Morris, "Covering Islam - Burqa and Hijab: Limits to the Human Right to Religion" (2004) Human Rights Research Journal p6

<sup>46</sup> ‘Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,’ Human Rights Commission of New Zealand, December 2005, p2

<sup>47</sup> The Hadith is the records of Muhammad’s life as an exemplary believer, see P Morris, "Covering Islam - Burqa and Hijab: Limits to the Human Right to Religion" (2004) Human Rights Research Journal p4

<sup>48</sup> John L Esposito (ed), *Oxford Encyclopedia of the Modern Islamic World*, (1995) p384

<sup>49</sup> Qur’an, Sura 33:59 and Sura 24:31 (Translation: Muhammad Asad, *The Message of the Quran* (1980) Dar Al-Andalus, Gibraltar)

<sup>50</sup> P Morris, "Covering Islam - Burqa and Hijab: Limits to the Human Right to Religion" (2004) Human Rights Research Journal p5

<sup>51</sup> ‘Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,’ Human Rights Commission of New Zealand, December 2005, p2

<sup>52</sup> Article 9(1)

<sup>53</sup> *Arrowsmith v the United Kingdom* (1978) 19 E Comm HR 7050/75 19

<sup>54</sup> See for example *Khan v UK* (1986) 48 E Comm HR 11579/85 253. The application of this test has not been haphazardly applied, and is vulnerable to accusations of wilfulness; Carolyn Evans *Freedom of Religion under the European Convention on Human Rights*. The European Court appears to have resiled slightly from the necessity test since then; in *Sahin*, the Court was willing to assume that the wearing of the veil by a religious claimant was a practice for the purpose of Article 9 (*Leyla Sahin v Turkey* (2004) ECHR44774/98 [71]). (Oxford University Press, Oxford, 2001) 115-123



may determine the question of necessity with reference to expert testimony.<sup>55</sup> As Griffiths observes in the New Zealand context, such an approach in the domestic adversarial context would ‘effectively involve the courts in heresy trials, a pursuit that would impermissibly entangle the courts in religious matters.’<sup>56</sup> In any event, the question of deciding which religious expert was authoritative in weighing theological debates within a religion with respect to Islam, a religion lacking either a supranational structure or an authoritative chain empowered to speak for adherents, would be impossible.

By contrast, the US Supreme Court has stated that for the purposes of the free exercise clause of the US Constitution, the Court is not equipped to resolve ‘intrafaith differences.’<sup>57</sup> The Canadian Supreme Court of Canada has similarly stated that if a religious practice is motivated by a sincere religious belief it is sufficient to trigger the Charter protections.<sup>58</sup> New Zealand also favours a sincere belief test; in *Razamjoo*, Moore J observed that “[t]he Court cannot be drawn into attempting to determine the theological or other ‘validity’ of the practice of wearing the burqa,” it was sufficient that it was a sincerely held religious practice of the witnesses.<sup>59</sup>

## 2. The fair trial right: Reliance on visual signals

Prior to the decision in *Sayed*, the matter had been considered in the Australian context in *R v Cannon*.<sup>60</sup> Amongst the appellant’s complaints it was noted that one of the witnesses, Benson, had been allowed to give evidence while wearing a hijab, on the basis of her adherence to Islam. The only comment in the joint judgment of the Queensland Court of Appeal was that no objection was taken to Benson’s manner of dress at trial and that ‘it is not at all clear how the course taken at trial can be said to have been irregular or, if it was, to have enured to the prejudice of the appellant.’<sup>61</sup> This comment was noted by Deanne J in her Reasons for Decision, but not engaged with. In particular, Deanne J does not appear to have connected the wearing of the niqab with the Court’s earlier comment (at [59]) that there was “no reason to think that the jury did not take into account all the criticisms which might legitimately be made of the evidence of these witnesses. Even taking these matters into account, it was reasonably open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant’s guilt.”<sup>62</sup> Critically the court added: “That is because there was sufficient support for each of these witnesses in the other evidence adduced by the Crown.”<sup>63</sup> Thus the Court’s emphasis was on the entire matrix of evidence, and the capacity of the jurors to determine for themselves, with adequate instruction from the judge, how much weight to give to the witness.

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<sup>55</sup> *D v France* (1983) 35 E Comm HR 199 10180/82

<sup>56</sup> David Griffiths, “Pluralism and the Law: New Zealand Accommodates the Burqa” [2006] OtaLawRw 8 at p14

<sup>57</sup> *Thomas v Review Board of the Indiana Employment Security Division* [1981] USSC 66; 450 US 707 (1981).

<sup>58</sup> See for example *Syndicat Northcrest v Amselem* [2004] SCC 47 (“*Amselem*”); *Multani*, at para. 34; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567, at para. 32..

<sup>59</sup> ‘Muslim Women, Dress Codes and Human Rights: an introduction to some of the issues,’ Human Rights Commission of New Zealand, December 2005, p12

<sup>60</sup> [2007] QCA 205

<sup>61</sup> *R v Cannon* [2007] QCA 205 at [67]

<sup>62</sup> *R v Anwar Shah Wafiq Sayed*, Transcript of Proceedings at Perth, Thursday 19 August 2010 at p1042

<sup>63</sup> *R v Cannon* [2007] QCA 205 at [59]

Judges in Australian appeal courts have traditionally relied upon the appearance of witnesses as they give their testimony at trial as a reason for appellate deference to the decision of a trial judge.<sup>64</sup> However, those same judges have cautioned against haste in drawing conclusions on the basis of witness appearance alone, or primarily, and scientific evidence casting doubt on the ability of anyone to judge the veracity of a witness on the basis of appearances has been accepted before the courts.<sup>65</sup> Attempts by fact finders to limit their reliance on the appearance of witnesses and to reach their conclusions instead on the basis of contemporary materials, objectively established facts, and the apparent logic of events has been noted with approval in the High Court of Australia.<sup>66</sup>

It would appear that the High Court has embraced the idea that ‘an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.’<sup>67</sup> In *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) (State Rail Authority)* Kirby J commented that ‘[t]here is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom.’<sup>68</sup> He continued:

*Apart from all else, demeanour is, in part, driven by culture. Studies suggest that evaluation of the evidence of women may sometimes be affected by stereotypes held by the decision-maker. This is doubtless also true in the case of evidence given by members of minority groups, whether racial, sexual or otherwise. Distaste or prejudice can cloud evaluation. Further, in a society such as Australia's, the capacity of the judiciary to respond to every cultural variety of communication is limited.*<sup>69</sup> [citations omitted]

Relevantly, Kirby J also referred to the growing body of work by professional psychologists that confirm the danger of placing undue reliance upon appearances in evaluating credibility.

*Such studies were not available to the appellate courts when the rules of deference to the assessments of trial judges on questions of credibility were first written. They are available to us today. Although they have not yet resulted in a re-expression of the appellate approach (and by no means expel impressions about witnesses from the process of decision-making) the studies have two consequences.*

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<sup>64</sup> *Fox v Percy* (2003) 214 CLR 118 at [30]

<sup>65</sup> eg *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 per Samuels JA

<sup>66</sup> *Fox v Percy* (2003) 214 CLR 118 at [30]

<sup>67</sup> *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co* 48 (1924) 20 Ll L Rep 140 at 152 (“The Palitana”) per Atkins LJ, cited with approval by Kirby J in *State Rail Authority* at p617

<sup>68</sup> (1999) 160 ALR 588 at [88]

<sup>69</sup> *State Rail Authority* at [88]

*Trial judges should strive, so far as they can, to decide cases without undue reliance on such fallible considerations as their assessment of witness credibility.*<sup>70</sup>

The other feature of the fair trial right is the strong interest in society of the visible administration of the justice system, particularly in criminal matters. There is some support for the third concern of Moore J in *Razmajoo*, namely that a public accusation and a public response to that accusation enhances public confidence in the administration of criminal justice. The degree of anonymity afforded to a witness wearing a niqab, or any other form of facial covering, may undermine the transparency and individual accountability essential to the effective operation of the criminal justice system.<sup>71</sup> However compelling this consideration may be, however, it is but one of a number of factors that the Court must weigh.

### **3. The Impact on Muslim Women of Forcing Removal**

In 2006 Ginnah Muhammad brought a civil suit against Enterprise Rent-A-Car in the State of Michigan for an amount of \$2,750. Rather than discussing her claim the judge told her frankly that if she did not remove her niqab her case would be dismissed, because the face veils interfered with his ability to see whether or not she was telling the truth.<sup>72</sup> Ms Muhammad's refusal is likely to have resonance for women all over the world. "I wish to respect my religion," she said. "I will not take off my clothes."<sup>73</sup>

Couched in this language, one wonders whether religious faith is really the central question in these cases. Very few women would willingly agree to testify in court if to do so required the removal of an article of clothing they feel to be intrinsic to their modesty. Where a woman has committed to wearing the niqab as a life choice, the removal of the veil in the presence of strangers can be profoundly disorienting, and significantly increase the vulnerability of women, even where they remove it voluntarily.<sup>74</sup> If they are compelled to remove it by the Court, then it is even more disturbing, and must inevitably undermine the faith of innocent parties in the working of the justice system.

According to this analysis, the likely impact of the judgment in *Sayed* is likely to be loss of access to justice, unwillingness to participate in the trial process as witnesses. In failing to consider the 'lived realities' of Muslim women, there is a very real danger that the District Court will effectively further marginalize an already targeted and besieged minority group.<sup>75</sup>

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<sup>70</sup> *State Rail Authority* at [89]

<sup>71</sup> Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) 4 *Crim. L. R.* 255, at pp. 260-62.

<sup>72</sup> Cited in Natasha Bakht, 'What's in a Face? Demeanour Evidence in the Sexual Assault Context', in *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era*, Elizabeth Sheehy ed., University of Ottawa Press, 2010 at pp9-10

<sup>73</sup> *ibid*

<sup>74</sup> Marion Moltena, *A Language in Common* (1987) The Women's Press, London; Fadwa El Guindi, *Veil: Modesty, Privacy and Resistance* (1999) Berg, New York

<sup>75</sup> Natasha Bakht (2010) 'What's in a Face? Demeanour Evidence in the Sexual Assault Context,' in Elizabeth Sheehy (ed) *Sexual Assault Law, Practice and Activism in a Post Jane Doe Era*, University of Ottawa Press, p2

### The Canadian example revisited

On 13 October 2010 the Ontario Court of Appeal handed down its judgment in *R v NS*.<sup>76</sup> The Court quashed the decision by the preliminary inquiry judge requiring the complainant to remove her niqab, finding that the judge had not conducted a full inquiry into N.S.'s religious freedom claim, and was thus unable to make the obligatory assessment as to the competing interests at stake. Importantly, the Court stated its respect for religious freedoms and strongly suggested that it will be rare for a court to require a woman to remove her niqab to testify. Moreover, the burden will lie with the accused person to show why removal of the burqa is necessary, and the onus of proof will be significant. Simple claims that it is important to see a witness' face will not suffice.

Although the Canadian decision was made in the context of a constitutional bill of rights, the procedures for assessing the competing interests between parties are applicable in the Australian context. Deanne J in *Sayed* ultimately acknowledged that the decision came down to just such a competition of interests, in spite of her earlier denial of the ICCPR's relevance.<sup>77</sup>

Writing for the Ontario Court of Appeal, Doherty JA suggested that when a court is faced with a claim by a witness that her religious beliefs compel her to wear a niqab when testifying and with a claim by the accused that the wearing of the niqab interferes with his ability to cross-examine, it should start by determining whether the rights claimed by each party are in fact engaged in the specific circumstances.<sup>78</sup> If the judge is satisfied that the witness has advanced a valid religious claim, the judge must next determine the extent to which wearing a face veil would interfere with the accused's ability to cross-examine in a fact specific context: 'if the witness's credibility was not in issue and she was giving evidence on a peripheral non-contentious matter, I would think that the judge would determine that any limit the wearing of the niqab imposed on her cross-examination was so insignificant that it could be safely disregarded.'<sup>79</sup> For this purpose, the judge may take judicial notice of a witness's credibility and reliability, but if the defence contends that the wearing of the niqab creates some special impairment to the cross-examination then they must establish those claims.<sup>80</sup>

In regards to the right to a fair hearing, Doherty JA noted that the extent to which a niqab actually impairs cross examination is 'somewhat limited'.

*The trier of fact still hears and sees the witness. Tone of voice, eye movements, body language, and the manner in which the witness testifies, all important aspects of demeanour, are unaffected by the wearing of the niqab. Nor does the wearing of the niqab prevent the witness from being subjected to a vigorous and thorough cross-examination... a judge in a jury case will bear in mind that the jury will be instructed that the onus of proof is on the Crown and that any*

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<sup>76</sup> 2010 ONCA 670

<sup>77</sup> *Sayed* Transcript at pp1045, 1047 and 1048

<sup>78</sup> *R v NS* at [70]

<sup>79</sup> *R v NS* at [71]

<sup>80</sup> *R v NS* at [72]

*difficulties the jury may encounter in assessing the credibility of a Crown witness because that witness is wearing a niqab must redound against the Crown as the party bearing the onus of proof. An instruction in these terms could well go a long way to negate any negative impact on the defence flowing from a limitation on the ability to cross-examine a witness who is wearing a niqab.*<sup>81</sup>

Doherty JA noted the impact on witnesses of asking them to undress in court, and included in the items for consideration:

*N.S. is a Muslim, a minority that many believe is unfairly maligned and stereotyped in contemporary Canada. A failure to give adequate consideration to N.S.'s religious beliefs would reflect and, to some extent, legitimize that negative stereotyping. Allowing her to wear a niqab could be seen as a recognition and acceptance of those minority beliefs and practices and... broaden access to the justice system for those in the position of N.S., by indicating that participation in the justice system would not come at the cost of compromising one's religious beliefs.*<sup>82</sup>

Ultimately, however, Doherty JA re-emphasized the centrality of the concept that 'the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice', and noted that where the accused's right to make full answer and defence would be infringed, the witness's right must yield.<sup>83</sup>

In a gentle acknowledgement of Deanne J's decision in *Sayed*, it was suggested that it could be distinguished because of the involvement of the jury.<sup>84</sup> However, it seems that many of the comments regarding the preliminary judge in *R v NS* are equally applicable to the judgment of Deanne J. Doherty JA noted that these are 'uncharted waters' but that there was inadequate enquiry into the nature of the religious belief held, that placed too great an emphasis on the limited times NS had been compelled to remove her veils (such as for her driver's license photograph) and her expression of the need to wear the niqab as a matter of comfort and preference rather than need.<sup>85</sup> It was also reiterated that if the witness made out her claim as to the strength of her religious conviction, the defence must then rely on something more than general claims based on the witness's demeanour and reliability. With respect, this is so strongly in accordance with the provisions of the UK Bench Book that it should be accepted as guidance and adhered to in the District Court of Western Australia.

## **Conclusion**

It is beyond the capacity of this essay to explore the competing strands of liberalism that feed the tension between multiculturalism and tolerance solely for the purpose of enforced integration, but it would appear that in Australia there is little real substance behind the lip service paid to religious tolerance.<sup>86</sup> Whether or not it is true to say that September 11, 2001

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<sup>81</sup> *R v NS* at [73]-[74]

<sup>82</sup> *R v NS* at [79]

<sup>83</sup> *R v NS* at [89]

<sup>84</sup> *R v NS* at [76]

<sup>85</sup> *R v NS* at [90]

<sup>86</sup> David Griffiths (2006) 'Pluralism and the Law: New Zealand Accommodates the Burqa,' 11 *Otago Law Review* 281 p2

intensified the antagonism experienced by the West, the coverings of Islamic women are regarded as controversial in many western nations.<sup>87</sup> The strong, bipartisan support for requiring a witness to display their face to the Court would be unlikely to find so much as an echo if the reason for the facial covering were medical necessity.

It is ironic that adherence to courtroom procedure appears in the *Sayed* judgment to have taken on an atavistic quality almost as extreme as the witnesses attachment to the niqab and, with respect, almost as little logic. It is not in dispute that asserting a right to manifest religious belief through the adoption of specific practices can have such serious repercussions for other people, it is accepted that some religious practices are not allowed.<sup>88</sup> Asserting a right to certain courtroom procedures may have the same impact. Thus we must always ask whether the interests of justice are served, and not get caught up in preconceived notions of how justice is served. It was for this very reason that the principles in the ICCPR were adopted by the international community, and subscribed to by Australia. It is to be hoped that future Australian courts will take the opportunity to recognize the valid interpretative role that such instruments should play in the Australian domestic context.

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<sup>87</sup> Paul Morris 'Covering Islam – Burqa and Hijab: Limits to the Human Right to Religion' (2004) Human Rights Research Journal, p1

<sup>88</sup> Brice Dickson, 'The UN and Freedom of Religion' (1995) 44 *International and Comparative Law Quarterly* 327