

CULTURAL DIVERSITY AND LAW



Legal Practice and Cultural Diversity



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Chapter 7

Objection, Your Honour! Accommodating *Niqab*-Wearing Women in Courtrooms¹

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Introduction

In 2006, a lawyer named Shabnam Mughal represented a client at the Asylum and Immigration Tribunal in England. Ms Mughal is a Muslim and wore a *niqab* or full-face veil in public places. During her submissions, she was told by Judge George Glossop to remove her *niqab* because he could not hear her. Perhaps a more appropriate response to the legitimate concern of not being able to hear an advocate as she made her submissions would have been, 'please speak up'. However, because such a request was not made, and because the lawyer refused to remove her veil,² the case was adjourned and Mughal was replaced by a male lawyer from her firm.³

This chapter is an attempt to analyse opposition to the *niqab* in courtroom settings. It is argued that permitting women to wear the *niqab* in courtrooms does not impede justice. Opposition to the *niqab* is usually a knee-jerk response to difference that is typically not grounded in any rational understanding of the actual circumstances at issue. The question that arises when such unfounded and unexamined objections to the *niqab* are raised is whether the restriction on attire is actually a subterfuge for discrimination (Renteln 2004: 140). Part I of this chapter

1 I am grateful for the outstanding research assistance provided to me by Jennifer Dick and Andrea Skinner. Funding for research assistance has been provided generously by the Law Foundation of Ontario and the Social Sciences and Humanities Research Council. I also thank Prof. Vanessa Gruben, Dr Sheema Khan, Dr Carmela Murdocca and Dr Baidar Bakht for their helpful comments.

2 My use of the term 'veil' refers to any of the head coverings used by Muslim women. I am always cautious of the use of broad non-specific terminology because emphasis on particularity tends to coincide with accuracy and nuance which is critical in debates such as that at hand. However, while I recognize that there are multiple ways in which women may cover portions of their faces/heads/bodies, at times I use this generic term 'veil' because it pervades the literature in this area and opponents of the 'veil' tend to conflate the different types of head coverings making it difficult to assess the specific nature of their objections.

3 Nick Britten 'Lawyer in a Veil is taken off Case', *The Telegraph* (15 November 2006). Available at: <<http://www.telegraph.co.uk/news/uknews/1534084/Lawyer-in-a-veil-is-taken-off-case.html>> [accessed 5 November 2008].

scrutinizes judicial assessment of credibility based on demeanour evidence, suggesting that demeanour is an inherently unreliable tool by which to judge truthfulness. Based on this scrutiny, this section of the chapter considers whether there might be instances in which the removal of the *niqab* may be necessary for justice to be done. Part II of the chapter suggests accommodation measures for *niqab*-wearing women in the few instances in which seeing their faces is necessary for the judicial task at hand. The illustrations in this chapter are drawn primarily from cases in Canada with some examples from Britain, the United States and New Zealand.

This chapter does not set out to explain why women might choose to cover their faces. Despite little qualitative research done to date on this question, some of the excellent research that has been done on women who wear the *hijab*⁴ suggests that there are several possible reasons why some Muslim women cover their faces. Because cultural symbols are socially constructed and contested, and are also the result of intersecting phenomena, the meanings attributed to the *hijab* or *niqab* are not endemic to the veil itself; rather they are produced through cultural discourses and social practices – they operate through vast networks of social relationships. The studies of women from several countries indicate that the veil is not a one-dimensional symbol. The veil means different things to different people within Muslim societies and different things again to Westerners than to Middle Easterners (Read and Bartkowski 2000: 396–7). This may well mean that the cultural significance of this symbol will have overlapping and opposing characteristics.

Whether it is in resisting racism (Hoodfar 1983: 18), expressing cultural difference (Atasoy 2006: 211; see also Read and Bartkowski 2000: 404), making a fashion statement (*Middle East Times* cited in Eum 2000: 112), articulating a religious identity (Wiles 2007: 720), helping as a device in the competition for husbands (Mule and Barthel 1992: 329) or some combination of the above, the veil cannot be understood as a symbol with singular meaning. Rather than conceptualizing the veil as a frozen embodiment of a particular culture or its subversion, most women actively engage with the symbols that the veil represents (Atasoy 2006: 218–19).

For the purposes of this chapter one is better served by acknowledging that regardless of the reasons why some Muslim women wear the veil, no matter the kind of veil it may be, and even if one believes that their choice is the result of false consciousness (Mackinnon 1983, cited in Wiles 2007: 719), for these women the veil is a critical factor of their being. To deny them access to a fundamental

4 The *hijab* literally means both ‘modesty’ and the ‘veil’ in Arabic. There are a variety of different forms of *hijab* or veils ranging from the headscarf (*hijab*) to the face veil (sometimes called the *hijab* or the *niqab*) to the *burqa* which covers the entire face and body. This chapter will refer to the headscarf as the *hijab* and the face-veil as the *niqab*, unless otherwise indicated.

legal institution on the basis of their identity is to deny them their dignity: as the Judicial Studies Board (JSB)⁵ in Britain noted:

To force a choice between that identity ... and the woman's involvement in the criminal, civil justice, or tribunal system (as a witness, party, member of court staff or legal office-holder) may well have a significant impact on that woman's sense of dignity and would likely serve to exclude and marginalise further women with limited visibility in courts and tribunals. This is of particular concern for a system of justice that must be, and must be seen to be, inclusive and representative of the whole community. While there may be a diversity of opinions and debates between Muslims about the nature of dress required, for the judicial system the starting point should be respect for the choice made, and for each woman to decide on the extent and nature of the dress she adopts. (JSB 2005–2008: 3-18/2)

In her study of colonial images of Muslim women, Hoodfar argued that the visibility of Muslim women's bodies became a battlefield in a struggle between modernist and conservative forces (Hoodfar 1993: 12). We cannot allow the hyper-invisibility of the bodies of *niqab*-wearing women to become the battlefield in a vague cultural conflict.

Part I: Opposition to the *Niqab* in the Courtroom

Alison Dundes Renteln (2004: 149–50) has argued that justifications for particular dress codes in courtrooms ordinarily include the need for the judge to maintain dignity, decorum and order, and the need to ensure the proper administration of justice, including the need to avoid jury bias and prejudice to guarantee a fair trial. While arguments against women who wear the full-face veil in courtrooms are sometimes articulated with more sophistication than is opposition to the *niqab* heard more generally, many of the justifications for this opposition are equally indefensible.

Immediately following the Shabnam Mughal event, the President of the UK's Asylum and Immigration Tribunal (AIT), Mr Justice Hodge, provided interim

5 The Judicial Studies Board (JSB) is directly responsible for training full- and part-time judges in England and Wales, and for overseeing the training of lay magistrates, chairs and members of tribunals. See <<http://www.jsboard.co.uk/index.htm>> [accessed 5 November 2008]. The JSB also produces publications that provide tools and guidance on topics of relevance to judges including an *Equal Treatment Benchbook*. Chapter 3.3 ('Religious dress') specifically provides guidance to judges on the wearing of the full veil or *niqab* in court: available at <http://www.jsboard.co.uk/downloads/ettb_veil.pdf> [accessed 5 November 2008].

advice for judges in his jurisdiction on the wearing of *niqabs* by representatives of parties in cases before the AIT. He stated:

Immigration judges must exercise discretion on a case-by-case basis where a representative wishes to wear a veil. The representative in the recent case has appeared veiled previously at the AIT hearings without difficulties. It is important to be sensitive in such cases. The presumption is that if a representative before an AIT tribunal wishes to wear a veil, has the agreement of his or her client and can be heard reasonably clearly by all parties to the proceedings, then the representative should be allowed to do so.⁶

In February 2007, the JSB published a chapter addressing religious dress in their *Equal Treatment Benchbook*. This chapter deals in greater detail with the issue of women wearing the *niqab* in the courtroom context. Importantly, the chapter reiterates Justice Hodge's pronouncement following the Shabnam Mughal incident that 'it should not automatically be assumed that any difficulty is created by a woman in court, in whatever capacity, who chooses to wear a *niqab*' (JSB 2005–2008: 3-18/3).

Niqab-wearing women hold multiple roles in the courtroom context. This section of the chapter canvasses the many roles that *niqab*-wearing women do or could play in the courtroom. Opposition to the *niqab* in this context must be able to definitively respond to the question 'What is the significance of seeing this woman's face to the judicial/legal task at hand?' I suggest that the instances in which seeing a woman's face is critical for the legal task are, in fact, quite limited.

The Perils of Relying on Demeanour Evidence

Before beginning an examination of each courtroom function, this section will address the most commonly held reason for why judges need to be able to see the faces of the people who come before them.

Often trial judges bear the responsibility of being triers of fact. As such, judges are permitted in law to assess the credibility of witnesses and the accused based on demeanour evidence. That is, judges are permitted to evaluate the trustworthiness of a person in court based on their appearance, attitude and/or disposition. Juries, who are also triers of fact, are expected to assess the sincerity of a witness's testimony as well. In Canada, as early as 1947, Justice Estey of the Supreme Court of Canada held in *R. v White* that

⁶ Judicial Communications Office, press release, 29/06, 'Guidance on the wearing of veils by representatives in courts and tribunals' (9 November 2006). Available at: <www.judiciary.gov.uk/publications_media/media_releases/2006/2906.htm> [accessed 5 November 2008].

The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere or frank or whether he is biased, reticent and evasive. All these questions and others must be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.⁷

Justice O'Halloran noted in the 1952 case of *Faryna v Chorny* that '[t]he law does not clothe the trial judge with a divine insight into the hearts and minds of witnesses'.⁸ Yet case after case makes reference to the special position of trial judges, as triers of fact. In *R. v Francois*, Justice Carthy of the Court of Appeal for Ontario stated: 'I cannot see the complainant, hear that voice as it offers explanations, or observe the body language that we all use to separate truth from fiction in face-to-face encounters.'⁹ The advantage of seeing and hearing the testimony of witnesses is often made reference to by appellate courts. In *Laurentide Motels v Beauport (City)*, Madam Justice L'Heureux-Dubé remarked:

[A]n appellate court which has neither seen nor heard the witnesses and as such is unable to assess their movements, glances, hesitations, trembling, blushing, surprise or bravado, is not in a position to substitute its opinion for that of the trial judge, who has the difficult task of separating the wheat from the chaff and looking into the hearts and minds of witnesses in an attempt to discover the truth.¹⁰

Similarly, in *R. v Jabiaranha*, the Supreme Court of Canada approved of the trial judge's reasons where she did not believe the defence witness in part because his demeanour demonstrated signs of untruthfulness:

[The accused and the defence witness] exhibited classic signs of discomfort when challenged on points and then would elaborate the details. Each was evasive at times or his eyes shifted around. Thus in certain points ... each by the story and his demeanour, displayed signs of untruthfulness.¹¹

Subjective factors clearly play a decisive role in the evaluation of credibility and the demeanour of a witness may lead to the rejection of that person's evidence. A witness may present a 'positive' demeanour, including a good tone of voice and appropriate body language that succeeds in overcoming any concerns the trier of

7 *R. v White*, [1947] S.C.R. 268.

8 *Faryna v Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.) [*Faryna*].

9 *R. v Francois* (1993), 14 O.R. (3d) 191 at 202 (C.A.), Carthy J.A., dissenting [*Francois*].

10 *Laurentide Motels v Beauport (City)*, [1989] 1 S.C.R. 705 at 799.

11 *R. v Jabarianha*, [2001] 3 S.C.R. 430 at para. 29.

fact may have with respect to the content of the testimony.¹² By contrast, there may be something about a person's demeanour in the witness box which may lead to the rejection of that person's evidence.

It may be that the juror is unable to point to the precise aspect of the witness's demeanour which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of the witness's demeanour cannot be taken into consideration in the assessment of credibility.¹³

Judges and juries are permitted in law to assess credibility based on demeanour and given what little we know about human beings, it may in fact, be our tendency to depend to some extent on indications of demeanour. Indeed several scholars have pointed out rather convincingly that evidence is less what is produced at trial and more the interaction of what is produced with the background and experience of the fact-finder (Seniuk 2000: 5).

But if the judge is not given divine insight into the hearts and minds of witnesses appearing before her/him, what are the telltale signs that reveal dishonesty? What are the badges of sincerity? How much importance should be assigned to subjective factors such as the tone of voice, the presence of an ironic smile or a nervous twitch of the face? How does one ascertain, relying on Justice Estey's words, whether a witness is sincere or frank or whether he is biased, reticent or evasive? Is not the acceptance or rejection of testimony on such grounds fraught with danger?¹⁴ Paul Ekman in his study of lying found that with rare exception, 'no one can do better than chance at spotting liars simply by their demeanour' (Ekman 1992: 285).

It is amazing to many people when they learn that all of the other professional groups concerned with lying – judges, trial attorneys, police, polygraphers who work for the CIA, FBI or NSA (National Security Agency), the military services, and psychiatrists who do forensic work – did no better than chance. Equally astonishing, most of them didn't know they could not detect deceit from demeanour. (Seniuk 2000: 4)

Demeanour may, of course, indicate truthfulness but it can also be misleading. Judging demeanour in the courtroom context is particularly challenging because judges and juries do not know the people who testify before them and thus have no sense of how they might react to stress. They do not have the opportunity to observe a person for a very long period of time or in an environment more natural to the witness. In *R. v Nelles*, the prosecution sought an inference of guilt from a

12 *Francois*, *supra* note 10.

13 *R. v Lifchus*, [1997] 3 S.C.R. 320 at para. 29.

14 Gilles Renaud 'Credibility and Demeanour: An Examination based on the World of Literature' (2001) Ontario Court of Justice, available at <<http://www.trussel.com/maig/credibil.htm>> [accessed 5 November 2008].

doctor's observation that the accused, a nurse charged with the murder of babies at the Hospital for Sick Children in Toronto, had 'a very strange expression on her face' and showed 'no sign at all of grief' when one of the babies died.¹⁵ In discharging Ms Nelles at the conclusion of the preliminary inquiry, Judge Vanek said:

Dr Fowler barely knew Susan Nelles, if at all; he knew nothing about her emotional range, her reaction to stress, or her manner of expressing grief. I am unable to find any evidence of guilt from what a doctor thought from a passing glance was 'a very strange expression' on the face of a young woman he barely knew [and] who had suffered a most harrowing experience.¹⁶

Judges are subject to the same cognitive biases as everyone else. Not surprisingly then, there is much case law that cautions against the use of demeanour evidence in determining credibility. In the often-cited case *Faryna v Chorny*, the British Columbia Court of Appeal stated that if 'a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.'¹⁷ The evaluation of demeanour may be far less reliable a gauge for the veracity of testimony than is the examination of the logic and coherence of an account. It would be a shame for a witness to be disbelieved simply because she made a poor impression due to her clothes, her mannerisms or her attitude, and yet the testimony was logical, coherent and consistent. By the same token, a witness may be able to look at counsel straight in the eye, be calm, cool and confident and yet advance a fact that is quite simply impossible to accept.¹⁸

Some of the dangers of relying on demeanour outside the judicial context have been documented in the context of policing. Prof. David Tanovich has written that in racial profiling cases, perfectly innocuous behaviour is often interpreted as suspicious simply because the observation was occurring through stereotypical lenses.¹⁹ As Justice Rosenberg has noted '[p]erceptions of guilt based on demeanour are likely to depend on highly subjective impressions.'²⁰

The cross-cultural context is but one example of a common erroneous interpretation of body language and behaviour. Possibly the best known concern

15 Mark J. Sandler 'Lessons for Trial Courts from the Morin Inquiry' (2005) at 38 [unpublished, on file with author].

16 *R. v Nelles*, [1982] O.J. No. 3654 (Prov. Ct. Crim. Div.) (QL) at para. 62.

17 *Faryna*, *supra* note 9 at 356. See also *R. v Pressley* (1948), 7 C.R. 342 (B.C.C.A.) at 347.

18 Renaud, *supra* note 14.

19 David M. Tanovich, 'The Further Erasure of Race in *Charter* Cases' (2006) 38 C.R. 84 at 10.

20 *R. v Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.) at 81.

in this respect surrounds the demeanour of First Nations witnesses whose testimony may have been discounted by resort to the apparent badge of sincerity associated with looking someone in the eyes. Some researchers have documented that Aboriginals who adhere to the unspoken rules about avoiding eye contact for courtesy reasons 'may appear to be shifty and evasive' (Shusta et al. 1995: 251).²¹

In *R. v Norman*, the Ontario Court of Appeal noted that the appearance of honesty and integrity on the part of witnesses may provide little assistance in assessing the reliability of their testimony because witnesses may well believe in what they are saying, regardless of whether it is accurate or not. Justice Finlayson stated:

I do not think that an assessment of credibility based on demeanour alone is good enough in a case where there are so many significant inconsistencies. The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is paramount.²²

Thus, in determining credibility, judges and juries are on firmer ground if they go beyond demeanour and seek support for their findings of credibility from the entire trial record (Sangmuah 1994: 4). A finding of credibility ought to depend not solely upon the impression made by the personal demeanour of a witness but also upon an examination of all of the elements and probabilities existing in the case. The appearance of telling the truth is but one of the elements that enters into the credibility of the evidence of a witness. 'Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.'²³ In cases of conflict of evidence, the test of the story of a witness as it relates to credibility must be 'its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions'.²⁴ In other words, the testimony of each witness must be regarded in light of all of the circumstances, including what other persons have said. Judges must subject the witness' story to an examination of its *consistency* with the probabilities that surround the existing conditions. Finally, the search for credibility ought to be grounded in more objective criteria such as prior inconsistent statements, contradictory assertions in examination-in-chief

21 This reference is not cited to suggest that all First Nations peoples react in such a fashion, merely that some do, as do many members of other groups for a variety of reasons.

22 *R. v Norman* (1993), 26 C.R. (4th) 256 (Ont. C.A.) at para. 47.

23 *Faryna*, *supra* note 8 at 356–57.

24 *Ibid.* at 357.

and during cross-examination and illogical propositions in the circumstances of the specific case at hand. Trial judges must be asked to go further and say that the evidence of the witness one believes is in accordance with the preponderance of probabilities in the case and, importantly, if their views are to command confidence, judges must also state their reasons for that conclusion.²⁵

Given the unreliability of depending solely on demeanour evidence, women whose faces are covered by the *niqab* should not then pose an insurmountable problem to the dispensation of justice in a courtroom setting. Though demeanour as a tool for assessing credibility is available to trial judges as a matter of law, using demeanour as the sole criterion upon which to base credibility is highly suspect because of the inherent dangers associated with accurately assessing the meaning of say a gesture or a look. Because a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element to the exclusion of others, but rather on all of the elements by which it can be tested in the particular case, judges who are unable to see a witness' face are not at such a great disadvantage.

Courtroom Roles: Examining the Impact of the Niqab

Women who wear the *niqab* have been in the courtroom context in several different capacities. This section of the chapter examines the impact of the *niqab* on these differing roles to determine whether the *niqab* poses an obstacle to justice.

As an Advocate Women who wear the *niqab* have acted as advocates in a courtroom. Lawyers are not examined for the truthfulness of what they say, thus evidence as to their demeanour and identity are irrelevant. The only real issue that could arise where an advocate or representative appears in a *niqab* would be concerns that the woman could not be heard, rather than seen. 'Just as in any case where a judge might have difficulty in hearing any party, witness or advocate, sensitively enquiring whether they can speak any louder or providing other means of amplification should suffice and such measures should be considered with the advocate before asking her to remove her veil' (JSB 2005–2008: 3-18/6).

Because judges retain a great degree of discretion in how their courtrooms are run, women wearing the *niqab* may find, as Shabnam Mughal did, that they are prohibited from representing their clients as a result of this discretion. In Pakistan, there appear to be signs of keeping veiled women from pleading in court. In November of 2006, Chief Justice Tariq Pervaiz Khan of the Peshawar High Court banned lawyer Raees Anjum from wearing the *hijab*²⁶ in his courtroom. He is quoted as saying, 'You are professionals and should be dressed as required of lawyers ... We [judges] cannot identify veiled woman lawyers and suspect

²⁵ *Ibid.*

²⁶ Although the word *hijab* is used in the article by Olden, cited below, reference is made to a full-face veil.

that veiled lawyers appear to seek adjournment of proceedings in other lawyers' cases.²⁷ That veiled advocates are suspected of misrepresenting themselves when lawyers have codes of conduct that they are required to abide by, indicates that even those most educated in justice do injustice by resorting to biased beliefs about a marginalized group of women. The JSB's Equal Treatment Advisory Committee in Britain has suggested that the starting point for a *niqab*-wearing woman in the courtroom must be that she is entitled to appear as an advocate wearing it (JSB 2005–2008: 3-18/6). They nonetheless state that judges retain the discretion to permit or forbid the *niqab* on a case-by-case basis. This general policy, as the JSB acknowledges, puts women who wear the *niqab* and their clients at a disadvantage because they would never know in advance of a hearing whether a judge would allow them to appear in their *niqabs*.

Judges should not be permitted to use vague or biased discretionary means to prohibit *niqab*-wearing lawyers from arguing in court. Logical lines of reasoning must be established and only where measures of accommodation have been exhausted should a refusal to permit an advocate to wear a *niqab* be acceptable.

As a Judge There are not many known instances of judges wearing the *niqab*. Apparently, some women judges in Peshawar's North West Frontier wear the *hijab* during hearings.²⁸ Some have suggested that lawyers must be able to read a judge's expressions. It might be argued that the inability to see a judge's face could compromise an accused's right to a fair trial. Although there is no 'right' to see a judge's face, some may argue that because judges are the 'face' of justice, questions around the transparency of the judicial process may be made.

In their report to the Québec provincial government on practices related to accommodation, Gérard Bouchard and Charles Taylor recommended that those employees of the state 'who occupy positions that embody at the highest level the necessary neutrality of the State, such as judges ... impose on themselves a form of circumspection concerning the expression of their religious convictions' (Bouchard and Taylor 2008: 151). Although the report goes to great lengths to articulate that the appearance of neutrality does not warrant a general rule that would prohibit agents of the state from wearing religious signs, little explanation is given as to why such a rule is necessitous for judges or police officers.²⁹ In

27 Ryan Olden, 'Pakistan Judge forbids Muslim Veils in Courtroom' *Jurist* (4 November 2006). Available online: <<http://jurist.law.pitt.edu/paperchase/2006/11/pakistan-judge-forbids-muslim-veils-in.php>> [accessed 25 November 2008].

28 It is unclear from this news report whether these judges wore the *hijab* or the *niqab*. What is known is that 'the local government in Pakistan is divided on the issue of veiled professionals'. *Ibid.*

29 Indeed this recommendation is entirely antithetical to a Federal Court of Appeal decision in Canada wherein it was held that accommodating Sikh men such that they could wear the turban as part of the official uniform for the Royal Canadian Mounted Police was

focusing on the importance of the appearance of neutrality, the report asks the rhetorical question: ‘Could a Muslim respondent assume the impartiality of a Jewish judge wearing a kippah or a Hindu judge displaying a tilak?’ (Bouchard and Taylor 2008: 151). The insinuation from such a question is that neutrality and impartiality would be impossible in this situation. But judges already have an explicit duty to maintain impartiality. Should they be unable to preside over a case impartially, they are required to recuse themselves. Moreover, if neutrality were based entirely on appearance rather than conduct, one would be left in a situation where members of the same ethnicity or gender would not be capable of judging others. As Madam Justice L’Heureux Dubé and McLachlin noted in their concurrence in *R. v R.D.S.*:³⁰

[J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

Rather than concentrating on the appearance of neutrality, where judges may never be successful in the sense of being purely objective, they must rather strive for impartiality. The genuine concern for transparency would be fulfilled by the judge’s rendering of precise reasons which could be appealed if necessary.

As Courtroom Staff The least contentious positions for women who wear the niqab are likely their roles as courtroom staff. Because courtroom staff, similar to advocates, are not being evaluated for the truthfulness of their comments, indeed some staff may say nothing at all during a hearing, issues surrounding the need to see their faces or hear their voices should not arise.

As a Witness or Defendant Arguably, niqab-wearing in court is likely to be most contentious when the woman wearing the niqab is testifying before the court. Generally speaking, courts seem to be satisfied of a witness’s identity if the witness swears or affirms her/his identity prior to giving any testimony. It would only be

consistent with the *Canadian Charter of Rights and Freedoms*. *Grant et al. v Attorney General (Canada)*, [1995] 1 F.C. 158 (F.C.A.). Leave to appeal to the Supreme Court of Canada was dismissed without reasons and with costs. 130 D.L.R. (4th) vii (S.C.C. Feb 15, 1996).

³⁰ *R. v R.D.S.*, [1997] 3 S.C.R. 484 at para. 38.

just that the word of a veiled woman should also be considered sufficient to prove her identity.

In the absence of clear rules to the contrary, judges have a great deal of discretion over the demands they can make of witnesses. On certain occasions judges have even dismissed cases outright where a woman has refused to remove her *niqab*. In *Muhammad v Enterprise Rent-A-Car*, Ginnah Muhammad tried to bring a suit in Michigan over the nearly \$3000 that a car rental company charged her for damage done when thieves broke into her rental car.³¹ Judge Paul Paruk dismissed the case when Muhammad refused to remove her *niqab* explaining that it was part of her religious way of life. Judge Paruk explained that he needed to see Muhammad's face in order to determine if she was telling the truth. He then went on to tell her that wearing the face veil was 'not a religious thing ... [but] a custom thing.'³² It is unclear that Judge Paruk actually needed to see Ginnah Muhammad's face in this case. There were likely no identification arguments to be made in this garden-variety small claims dispute. While judging her credibility may well have been an important aspect of the case, as previously noted, even this could likely have been done without resort to unreliable demeanour evidence.³³ Furthermore, it is unclear why Muhammad's evidence could not have even been admissible. Had the judge truly felt constrained in his ability to evaluate her evidence, he could simply have considered this when weighing her testimony.

Consideration should also be given to the fact that a *niqab*-wearing woman may be in a court not of her own choice. She may be a reluctant witness or a fearful victim/complainant who has been subject to abuse. In such instances the very act of removing the veil combined with the added pressure of appearing in a court could be traumatic enough to have an adverse impact on the quality of evidence given. Judges will be unlikely to distinguish these various strains on a woman's testimony. In ensuring a fair hearing, judges should ask, 'What is required to enable a woman wearing a *niqab* to participate in the legal process, to facilitate her ability to give her best evidence and to ensure, so far as practicable, a fair hearing for both sides?' (JSB 2005–2008: 3-18/3). Forcing a woman to choose between giving evidence to secure a conviction and wearing the *niqab* seems contrary to a just and impartial process.

While it may be difficult in some cases to assess the evidence of a woman wearing a *niqab*, the experiences of other judges demonstrates that it is possible to do so (JSB 2005–2008: 3-18/4). Judges must use their discretion carefully by considering whether the veil represents a true obstacle to the evaluation of the

31 *Muhammad v Enterprise Rent-a-Car*, No. 06-41896-GC (Mich. 31st Dist. Ct. Oct. 11, 2006) [*Muhammad*].

32 Transcript of Record at 4–5, *Muhammad*, *ibid*.

33 As one author has noted, Judge Paruk may have benefited by recalling that 'Themis, the goddess of justice wears a blindfold for a reason'. Steven Lubet, 'When does a Muslim Veil become a Poker Face? A Judge who Insisted a Woman remove her *Niqab* was Wrong', *The Chicago Sun Times* (11 March 2007) B2.

evidence. The exclusion of women who wear the *niqab* from courtrooms should not be justified with resort to the amorphous phrase: in the 'interests of justice'. Judges must be able to state categorically the judicial reason for needing to see a woman's face.

Perhaps of greater concern for the witness or defendant who is permitted to wear the *niqab* in a courtroom is the implications that the veil could have on perceptions of her credibility or right to receive a fair trial. 'If a woman wears a full veil in court, then I'm very concerned that negative implications will be subconsciously drawn and will work to the detriment of an advocate, a defendant or a witness. There is also a higher likelihood of alienation.'³⁴ Because most people have little contact with fully veiled women and because many preconceptions against veiled women confirm their status as 'other', juries are likely to draw adverse inferences from their testimony or mere presence. As Judge Gloria Epstein noted, 'The reality is that people tend to be more comfortable with, and therefore believe, their own kind' (Epstein 2002: 11). While judicial education on the unreliability of demeanour evidence is having the result that some judges 'strenuously resist allowing demeanour to factor into an assessment of credibility' (Epstein 2002: 12), the same cannot be said of juries. It is probable that juries will perceive, even if subconsciously, *niqab*-wearing women as being less credible. Just as bell hooks has argued (1981) that black women are not seen as trustworthy because they do not conform to our socially held images of figures of authority, *niqab*-wearing women are likely to be perceived as untrustworthy because they do not 'look' honest or deserving of respect. In addition to keeping their own prejudices in check, judges must then play the very important role of instructing juries, who may be susceptible to subconsciously devaluing the testimony of a veiled witness, to remain impartial.

In Canada, the Supreme Court has held that it is appropriate to question potential jurors as to their racial bias during the jury selection process.³⁵ Bias may affect a trial in different ways; for example, by inclining a juror to reject or put less weight on the evidence of the accused. Bias may also 'predispose the juror to the Crown, perceived as representative of the "white" majority against the minority-member accused ... to resolve doubts about aspects of the Crown's case more readily'.³⁶ Many of the biases which people hold against African and Aboriginal Canadians relate to notions of higher criminality associated within these groups. Given the multiple and often irrational objections that people have to the *niqab*, it would not

34 Interview of Homa Wilson by Tilly Rubens (6 February 2007) in 'Should the Veil be Worn in Court?' *Times Online*, <<http://business.timesonline.co.uk/tol/business/law/article1331659.ece>> [accessed 25 November 2008]. Judge Moore in *Razamjoo*, *infra* note 42 at para. 71 also expressed concern that 'evidence given from beneath a burqa would, consciously or unconsciously, be accorded less weight than the same evidence given by that witness when her face was visible.'

35 *R. v Williams*, [1998] 1 S.C.R. 1128 [*Williams*].

36 *Ibid.* at para. 11.

be difficult to make an argument that jurors could see a veiled accused as more likely to commit crime, particularly certain kinds of offences or that they may hold a negative view of her and her faith which could impact upon their partiality.³⁷

As a Juror Women who wear the niqab may also be summoned for jury duty. While lawyers have peremptory challenges and challenges for cause available to them in order to exclude a woman wearing the full-face veil as a member of a jury, these challenges cannot be based on bias. Rather, they can only be used to avert the possibility that a niqab-wearing woman is incapable of treating the accused person impartially. Judges must ensure that there is a genuine and legitimate basis for such a challenge and not improper predispositions of the kind that stereotype women who wear the niqab.

Part II: Accommodating *Niqab*-wearing Women in the Courtroom

‘The justice system should encourage practices which will enable as many people as possible to participate and engage with judicial processes’ (JSB 2005–2008: 3-18/2). To force a choice between religious identity and participation in the justice system is to put women with already limited visibility in courts in an untenable situation.³⁸ Indeed the impact of being excluded from the justice system is not insubstantial. Ginnah Muhammad, whose case was dismissed after Judge Paul Paruk refused to let her testify with the *niqab*, said: ‘When I walked out, I just really felt empty, like the courts didn’t care about me.’³⁹ After being told by the Chief Justice to remove her face veil if she wished to act as an advocate, Raees Anjum commented: ‘I was embarrassed when the chief justice asked me not to wear veil in courtrooms [*sic*]. I feel more confident in my hijab ... [It] reflects a

37 *Ibid.* at para. 28. ‘Evidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead to the conclusion that there is a realistic potential for partiality. The potential for partiality is irrefutable where the prejudice can be linked to specific aspects of the trial, like a widespread belief that people of the accused’s race are more likely to commit the crime charged. But it may be made out in the absence of such links.’ *Ibid.* at para. 27.

38 Importantly, marginalized communities feel deeply the efforts made by institutions such as courts to include them in their processes. The Islamic Human Rights Commission welcomed the JSB guidelines. Chairman Massoud Shadjareh said: ‘In the climate of Islamophobia that we live in, it is heartening to see the courts base their guidelines on the merits rather than on intolerance and prejudice.’ ‘Muslim Veil Allowed in Courts’, *BBC News* (24 April 2007). Available online: <<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/england/staffordshire/6588157.stm>> [accessed 25 November 2008].

39 Paul Egan, ‘Muslim Woman told to Remove Veil in Court Files Lawsuit’, *The Detroit News*, 28 March 2007. Available at: <<http://www.muslimnews.co.uk/news/news.php?article=12521>> [accessed 5 November 2008].

woman's modesty.⁴⁰ And finally, in a New Zealand case that considered whether two witnesses could give their testimony in a criminal trial while wearing the *burqa*, one witness said that she would rather kill herself than reveal her face while giving evidence (Ahdar 2006: 654).

These reactions to the removal of the *niqab* in the courtroom must be taken seriously as the removal of the veil can be profoundly disorienting and can lead to serious vulnerability. As the JSB in Britain has noted, there are many alternatives available to judges wishing to accommodate women who wear the *niqab*. Judges can typically rely on the inherent powers of the court to regulate the conduct of its procedures.⁴¹ Just as courts can prevent abuse of its procedures, judges can also depart from normal trial processes when this might assist in the participation of otherwise marginalized groups. As a New Zealand court in *Police v Razamjoo* noted, 'The court has those inherent powers so that justice might the better be done.'⁴²

An often cited reason for prohibiting the *niqab* in the courtroom is the inability of the judge or jury to hear the woman because her words are not being clearly transmitted through her veil. Measures can easily be taken to rectify such a problem including politely asking the woman to project her voice or arranging to have the woman use a microphone.

In situations where the identity of the *niqab*-wearing woman must be verified, women court staff can simply validate a woman's identity by asking her to remove the veil for the purposes of comparing a piece of photo identification with her face. As Homa Wilson, has noted, 'Muslim women don't object to removing their face veils in the presence of other women.'⁴³

While claims about the necessity of seeing a woman's face in a courtroom context will undoubtedly be repeated, it should not be forgotten that there are circumstances where judges will take evidence without being able to see the witness's face: for example, where evidence is taken over the telephone⁴⁴ or where

40 Olden, *supra* note 27.

41 In Canada see *MacMillan Bloedel Ltd. v Simpson*, [1995] 4 S.C.R. 725 at paras. 15 and 33 and H. Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23 at 27. In the United Kingdom see: *The Civil Procedure Rules 1998* (U.K.), S.I. 1998/3132, L.17, rr. 32.1(1)(c), 32.3, 39.2(3)(g). US federal courts possess an inherent authority to impose sanctions for the conduct of litigants in counsel regardless of whether the behaviour at issue would be covered specifically under a rule or statute. *O'Brien v Ed Donnelly Ents., Inc.*, 2006 WL 2583327, at 2 (S.D. Ohio Sept. 5, 2006).

42 *Police v Razamjoo*, [2005] D.C.R. 408 (D.C.N.Z.) at para. 99 [*Razamjoo*].

43 In Rubens, *supra* note 35.

44 Section 714.3 of the *Criminal Code of Canada* permits the reception of evidence in certain circumstances by telephone. To invoke the provision, the court must be of the opinion that it would be appropriate in all of the circumstances. In *R. v Chapdelaine*, 2004 Carswell Alta 48 (Q.B.) (WLeC) an application to bring evidence pursuant to s. 714.3 of the *Criminal Code* to have two witnesses provide evidence by telephone was granted.

the judge is visually impaired.⁴⁵ Clearly, if testimony can be given without resort to visual cues in some situations the requirement to see a witness's face is contrary to logic. Moreover, any prejudice associated with not being able to see the witness's face can be dealt with at the stage of weighing the evidence rather than prohibiting its admissibility.

The JSB has stated that any request to remove a veil should be accompanied with an explanation by the judge of his/her concern that 'where there are crucial issues of credit, the woman might be at a disadvantage if the judge or jury is not able to assess her demeanour or facial expression when responding to questions' (JSB 2005–2008: 3-18/4). It has also been suggested that the woman be given the opportunity to consult with her legal representative or witness-support worker. The importance of judicial sensitivity in this matter cannot be overstated. Some judges have used their cultural sensitivity to come up with creative solutions to such issues.

In New Zealand, Judge Lindsay Moore devised what has been described as an 'elegant compromise' (Ahdar 2006: 205) in *Police v Razamjoo*, a criminal case involving false statements made to the police as part of an insurance fraud.⁴⁶ In this case, the issue was whether the two Muslim witnesses for the Crown could wear *burqas* while giving their testimony. Defence counsel argued that the inability to observe the demeanour of the witnesses would impair the accused's right to a fair trial. Judge Moore acknowledged that what was at stake in the case were the rights of the witnesses to manifest their religious belief, the defendant's right to a fair trial⁴⁷ and the public's right to an open and public criminal justice system.⁴⁸ Judge Moore concluded that the two witnesses would be allowed to give their evidence from behind screens so that only the judge, counsel and female court staff would be able to see the witnesses' faces.⁴⁹ He also provided that so long as the witnesses' faces were visible, the witnesses could wear a hat or scarf to cover their hair. The trial proceeded according to these guidelines and the defendant was convicted.

45 JSB 2005–2008: 3-18/5. In the United Kingdom, there are a number of blind justices who sit regularly. Their blindness is only an obstacle in a small number of cases where there were exhibits requiring visual scrutiny. *Razamjoo*, *supra* note 42 at para. 48.

46 *Ibid.*

47 Importantly, what constitutes a fair trial is a balance between the rights of the accused and the public interest in the effective prosecution of criminal charges through criminal processes that are sensitive to the needs of victims and witnesses. For a Canadian case that balanced the accused's right to a fair trial with the complainant's privacy rights see: *R. v Mills* [1999] 3 S.C.R. 668.

48 *Razamjoo*, *supra* note 42 at para. 107.

49 The courtroom staff in this case were women. While the two counsel and judge were men, Judge Moore relied on the evidence of one of the witnesses', Mrs Salim's, beliefs regarding some relaxation in relation to being unveiled in the presence of relatively aged male authority figures as opposed to males generally. *Razamjoo*, *supra* note 42 at para. 111.

Judge Moore's intermediate solution between the two stark alternatives of taking off the veil or not giving testimony was thoughtful in its attempt to accommodate these Muslim women. He realized that exposing one's self to an entire courtroom of people would be upsetting to these women: 'to require her to remove her burqa in public (dire emergencies or other very compelling reasons excepted) would be to shame and disgrace her both in her own eyes and in those of the community of like believers whose customs and beliefs she is proud to uphold.'⁵⁰

Interestingly, in order to create the compromise that he did, Judge Moore agreed to hear the testimony of Mrs Salim in her *burqa*. Although Judge Moore found receiving evidence from a *burqa*-wearing witness difficult, it was not impossible. 'A sense of the witness's character emerged, though much more slowly than is usual when a witness can be seen ... Courts (and people) adjust over time to the new or strange. Written statement or tape recorded evidence is even more impersonal than listening to a person whose physical appearance and reaction one cannot see.'⁵¹ Judge Moore went so far as to say that 'the Court is reluctantly forced to the conclusion that there could be a fair trial even if Mrs. Salim and other witnesses of like belief gave evidence wearing their burqas'.⁵² Judge Moore ultimately decided upon the compromise rather than permit evidence from being given wearing a *burqa* because he was concerned that adopting procedures so out of keeping with the expectations of the community would seriously call into question the confidence in the justice system.⁵³

Importantly, in the aftermath of *Razamjoo*, policy-makers responded to the issues that arose in this case by proposing a statutory means of accommodation. Section 103 of New Zealand's *Evidence Act 2006* provides that a judge may permit a witness to give evidence 'in an alternate way' on the grounds of 'the linguistic or cultural background or religious beliefs of the witness'.⁵⁴

Conclusions

This chapter has examined a variety of objections to the wearing of the *niqab* in courtroom settings. Most of the objections articulated have no basis in critique or can be managed with minor accommodations that would permit *niqab*-wearing women to participate fully in public life. The most contentious objection to *niqab*-wearing women appears to be the inability of the judge to adequately make determinations of credibility. However, given the growing case law and academic research that points to the unreliability of demeanour evidence, judges must seriously question reliance on this antiquated method of assessing behaviour.

50 *Ibid.* at para. 67.

51 *Ibid.* at para. 69.

52 *Ibid.* at para. 106.

53 *Ibid.* at para. 95.

54 *Evidence Act 2006* (N.Z.), 2006/69, s. 103.

When opposition to Muslim women's attire is irrational, one must ask what is really going on.

Women who wear the *niqab* seem to challenge people's core convictions about how one should pursue the good life. Rather than reacting with suspicion, we might be better served to question our own cultural assumptions. In the courtroom context, there are very few instances that would make it necessitous to see a woman's face. Thus, judges should not have unfettered discretion to exclude *niqab*-wearing women from courtrooms absent the inability to complete their judicial duty without seeing the woman's face. Even in such situations, judges must be sensitive to the impact that removing the veil can have in such a public space and be creative in their measures of accommodation.

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