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5-5-2011

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Recommended Citation

Asat, Rayhan, "Veil or No Veil? Are We on the Right Track?" (2011). *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 53.

http://scholarship.law.cornell.edu/lps_clacp/53

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Veil or No Veil? Are we on the right track? ¹



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Islamic headscarf and the World

In recent years, it is ironic that a simple Muslim headscarf became one of most contentious and controversial political, culture, religious and human rights issue in various countries around the world. The Muslim headscarf affair has given rise to heated debate in Europe in particular. Extensive scholarship literature contributed to this debate from various aspects, including from the banning of the Niqab² from a public sphere, to institutional education and from the courtroom context. One has to acknowledge that few expressions of faith today cause as much fear and loathing in plural democracies as the Muslim headscarf has.³ I intend to contribute to this international debate as a minority Muslim Feminist Scholar, whose cultural expressions and national identity has not been subject to this debate yet her religious identity and belief has been strongly tied into the topic.

Academic literature on this topic pointed this controversial debate towards the title of National security, secular identity, public order and gender inequality.⁴ These are the most discussed areas, which clashed with the Muslim identity. When Individual identity of one Muslim clashed with the collective identity of a state, an argument on individual rights might be doomed to fail, however in this context, it is not a singular identity of a particular person but a group of a large population whose identity struggled with the obsession of national stupidity that prevailed in Europe.

It is ironic that within the western world, different approaches have been

² This Author focuses on this particular form of Islamic headscarf that

³ Cited Fareen Parvez, Muslim Class Relations and the Freedom to Veil, Secularism and "Burka "in France, and here I would like to explain that the term Burka could be intertwined with "Niqab "

⁴ Laura Barnet, Freedom of Religion and Religious symbols in the Public Sphere, Law and Government Division, 13 October, 2004 As Laura puts it in this article: Legal and public policy acceptance or accommodation of these religious symbols depends on a variety of factors, but is most often rooted in a constitutional proportionality test that balances the right to freedom of religion against the possible threat to safety, security and public order.

adopted towards the Islamic headscarf in different jurisdictions. On the outset, the ways in which the Islamic headscarf played out in different societies is very much related to the notion of secularism, the nation state's commitment of long term immigration history, and the state neutrality. However, the true essence of this very controversial issue is how the nation state address multiculturalism and their willingness to accept diversity, embracing differences of religion and culture, and the ways in which freedom of religion displays in a true democratic society with the accommodations of state and judicial system. It is true that legal and public policy acceptance or accommodation of Muslim headscarf depends on a variety of factors, but is most often rooted in a constitutional proportionality test that balances the right to freedom of religion against the possible threat to safety, security and public order.⁵ For the fact that different countries apply varying interpretations to this balance, is it justified under the analysis that traditional counties of immigration (United States and Canada) perceive religious freedom differently than countries with recent immigration, France in particular? Why is the French secularism different than American Secularism?

Two very different approaches clearly illustrated how secularism adopted in different jurisdictions. In the case of Nashaha, at a public school in Oklahoma, she was suspended because of her religious cloth failed to accord with the school dress code; the government intervened in this case to prevent such a policy that would deny Muslim students to have access to education. It was a completely different approach and outcome when three schoolgirls showed up in a small town of France in Islamic religious headscarf. The French obsessions with the headscarf affair started in all parts of France. Looking at this different response in these two western democratic counties one would find that it is not about how French society dealt with the religious headscarf in a manner that contrasted sharply with the approach adopted by countries with a longer history of immigration, but it is a matter of the deference, and accommodations a true secular state displays with respect to cultural and religious expression. Some scholars argued that the United States is constitutionally secular in the sense of expressing state neutrality in religion rather than seeking to replace religion with humanist values as France does.⁶ In a true secular state a citizen, whether citizen by origin or by subsequent acquirement, would feel free to demonstrate their meaningful expressions of fundamental religious freedoms.

⁵ Supra Laura Barnet

⁶ Supra Ibrahim Abraham

Without going into further analysis as of how the Muslim identity has been perceived after 9/11, let us instead move away from that dark period, in which the world struggled against terrorism and yet certain nations engaged in it. Let us instead focus on the current legal regime. Globalization has provided citizens of all countries the opportunity of international migration; new immigrants have found themselves in an environment where their religious beliefs and cultural identity clash with the identity of the traditional homogenous society. This clash reaches its pinnacle when tensions between cultures are manifested through the treatment of religious symbols in the public sphere. However, has the Muslim headscarf issue played out differently in countries that have experience in dealing with immigration for a longer period of time, such as the United States or Canada? Is it safe to say that in those countries, the state has rightly addressed freedom of religion with public order and has truly balanced state neutrality with religious accommodations?

It has been much appreciated by the American Muslim community that in North America, students find themselves in an educational system that tolerates religious expressions, although the term “tolerance” is perhaps not the right term to use in defining the balance that the state ought to demonstrate with respect to religious freedom and state neutrality. Perhaps the term to be used should instead imply the showing of deference to the freedom of religion and to the integration of different cultural identities.

Are the different interpretations and meanings attached to the Islamic headscarf in different societies the outcome of different approaches fostered in different jurisdiction, and are we then left with the question as of how to define the Islamic headscarf in a democratic society?

Islamic headscarf and our perceptions to it

There are different terms to refer to Islamic headscarf, Hijap, Niqab⁷Burka to name a few. There is no uniform approach to the terminology for the Islamic headscarf. What does then this controversial article of clothing mean to Muslims themselves, and how is the assumption about this meaning

⁷ This author will particularly look at the most controversial Islamic dress Niqab has been subject to heated debate, for the purpose of Niqab in a courtroom setting

portrayed in Western context? According to Muslim belief, the headscarf is an expression of modesty and is required by religion. However, many arguments from proponents of a ban on the Niqab, assume various degrees of coercion and oppression. In order to discuss Muslim women's practice of Niqab in a courtroom, this article first provides a summery introduction of how certain religious symbols such as veiling have been perceived in many civil societies. In so doing, this article provides a critical analysis of how gender equality, oppression of women, and self-emancipation play out in this context. Some Muslim scholars who oppose the banning of the veil make the argument that religious symbols should be perceived as a way of religious, cultural identity. Social surveys and examinations showed that banning the veil or giving it a meaning that is different from its traditional meaning further increases racial discrimination in a society where only well-integrated and socially assimilative Muslim populations are favored. If that is the outcome, what is the rationale for certain nation-state to ban veiling from public sphere?

One of the common argument hold by most scholars is that the Islamic headscarf, whether it is called Hijab⁸ or Niqab, has been assigned different meanings on public discourse of rights and national security. In the case of *Sahin v. Turkey*, gender equality was of the utmost concern for the European Court of Human Rights. There are certainly debates to be held concerning the Niqab in the course of creating, maintaining, and perhaps even subverting gender hierarchies, but the European Court of Human Rights has not yet in any context and to any satisfaction judicially considered what role Hijap plays in gender issues. So why is this obsession with the Islamic headscarf? Is it not true that states engage in a silent violence and oppression by taking away freedom of religion, cultural and religious expression that have been practiced by Muslim women for years, moreover, through banning by denying access to education, professional employment, access to justice⁹ does the state take advantage of power dynamics and exclude, isolate, and radicalize a particular group of society? Indeed, there were few

⁸ Hijap is a type of Islamic dress that is less controversial compare to the full body dress of Niqab, *it could be seen as a loose garment.*

⁹ In the case of *Muhammad v. Enter. Rent-A-Car*, Muhammad 's lawsuit brought against a car company dismissed on the ground that she refused to remove her veil, which required by the trial judge for weighing her witness credibility. As a result she lost her day in court.

cases that reported of coercive veiling , but one has to differentiate between voluntarily veiling and coercive veiling. There are inevitable individual cases that might occur in western society, taking on way different shapes and forms.¹⁰ Within international law norms and the human rights context, whether it is a fashion hijab or Muslim headscarf, one should avoid attaching negative meanings towards a simple headscarf that does not accord with our fashion and taste.

In that regard, a truly secular or democratic state is one where everyone has the right to manifest his or her religion and culture without being perceived by the larger community as narrow-minded or oppressed. There are several establishments in society, where freedom of religion and state neutrality is carefully considered, but at the same time, where limitations to the free exercise of religion are imposed. There are ways in which states could balance those particular situations, without infringing upon individuals right to freedom of religion and expression. In cases where national security is at stake and the possibility of personal identification is essentially required, Muslim women will be more than willing to cooperate if they feel that their religious and cultural identity have been well respected and accommodated.¹¹

Niqab in a courtroom setting

With reference to my main focus – Niqab in courtroom settings – I have found myself trapped in very few jurisdictions where there is no official banning of the Niqab from the public sphere, but where controversies about as whether to accommodate or restrict the freedom of religious expressions in courtroom settings have been central to the discussion of the topic. In a jurisdiction where veiling has been banned from all public spheres, there will be no room for debate over the wearing of Niqab in court procedures.

Numerous judgments passed by different jurisdictions with respect to the

¹⁰ Here I am referring All forms of violence women might face in all society

¹¹ This has been the case for Muslim women;

wearing of a Niqab¹² in a courtroom settings, the Ontario court of appeal passed a landmark judgment on this issue on October 13th 2010. It took Canadian courts one step forward in that it fairly addressed concerns related to the competing interest of different parties on the same matter. By applauding this judgment this master thesis seek to analyze the banning of the Niqab in a courtroom procedure. This thesis will particularly look at justice systems that place a "considerable value" on the ability to see a witness's facial expressions during assessments of credibility and for the reason of providing a fair trial to both parties.

Within this framework, my article in its best effort identifies different jurisdictional approaches on this matter and critically analyzes different approaches has been adopted in different jurisdictions. By doing so, this thesis proposes a creative method in balancing the competing interests of affected parties as well as the state.¹³ To further elucidate possible and future discussions on the Niqab in the courtroom, this thesis will also discuss in great detail a number of cases where Niqab-wearing women were engaged as plaintiffs, defendants, and even judges.

By examining different jurisdictions' approach in addressing Niqab in the courtroom settings and I will also explore questions as to how one balances the religious freedom of a witness and the accused's rights to a fair trial in a courtroom context. From the cases regarding the Niqab in a courtroom, it seems that judges have a different interpretation of the Niqab in relation to freedom of religion. In cases where judges understand the Niqab as a form of custom rather than a requirement of religion, they are more willing to ask the woman to remove the Niqab in a courtroom. The increased likelihood of this might have the result that the Niqab wearing woman will lose her day in court and see the dismissal of her case. The question that then arises is how should the court balance defendant's right to a fair trial and witness's or the plaintiff's right of access to justice?

In its ruling on this matter of Niqab in a courtroom procedure, the Ontario court of appeal reviewed the case in a manner in which gender equality, Islamic cultural practices, religious sincerity, the value of "demeanour

¹² The author tends to use this term owing to this article's intention of discussing Niqab in the court procedure

¹³ The government has an interest in upholding both constitutional rights. Protecting religious freedom and ensuring criminal defendants to receive a fair trial

evidence," the rights of sexual assault victims, the court's ability to accommodate exceptional circumstances, and the common law's adversarial justice system, were all discussed at one point or another.¹⁴ At the same time, it set out a list of considerations that judges must take into account when attempting to balance the religious freedom of a witness against the fair trial rights of accused persons, and clarified that there needs to be a case by case assessment for each case.¹⁵

Findings in different jurisdictions have supported that courts are inclined in favor of women wearing the Niqab where it does not prejudice a fair trial or interfere with the administration of justice. As Mrs. Justice Cox noted: "We respect the right for Muslim women to choose to wear the Niqab as part of their religious beliefs, although the interests of justice remain paramount"¹⁶ The question that remains is to what extent should the justice system accommodate religious belief? Section 103 of New Zealand evidence act of 2006 provides that a judge may permit a witness to give evidence in alternate ways on the grounds of "the linguistic or cultural background or religious belief of the witness"¹⁷ Are the considerations set out in a court of appeal judgment ample resources for our judges to exercise their discretion in determining whether or not to accommodate religious beliefs? Are we on the right track, considering this appeal judgment? Should Canadian policy makers respond to the issue in the same way as New Zealand did by providing statutory considerations?

United States and Canada adopted similar approach with regard to Islamic religious headscarf-Niqab, in both jurisdictions except Quebec provinces of Canada, the niqab has portrayed in a multiculturalism context. Both states choose the approach of integrating different cultural expressions based on differences. However, with respect to the Niqab in a courtroom, United States Court surprisingly took a very different approach than Canadian court.

¹⁴ Globe and mail .lex nex academic

¹⁵ Ontario Court of appeal Judgment, , R. v. N.S., 2010 ONCA 670 DATE: 20101013 DOCKET: C50534-C50892

¹⁶ Birmingham Post, Judges back wearing of veil in British courts, April 25, 2007, Wednesday 1ST Edition, Available at: <http://www.lexisnexis.com.ezproxy.library.yorku.ca/hottopics/lnacademic/>

¹⁷ New Zealand Evidence act 2006, 2006/69, S103

In the case of *Muhammad v. Enter. Rent-A-Car*, the plaintiff, Muhammad insisted on wearing her Niqab while she was testifying. The Michigan trial judge dismissed the case on the basis that witness credibility was at stake because facial expressions could not be seen. As a result, concerns over the conflict of interest between two constitutional rights – the right of freedom of religion and the right to a fair trial – attracted great deal of attention of policy makers. The Michigan Judges Association and the Michigan District Judges Association adopted a new statewide rule "giving judges 'reasonable' control over the appearance of parties and of witnesses, to observe the demeanour of such individuals, and to ensure they can be accurately identified."¹⁸ With respect to this call of taking control in a courtroom, the argument could be made that judges can exercise control and yet be highly tolerant of person's style and religious preference.¹⁹

The Equal Treatment Advisory Committee of the United Kingdom's judicial study board urged tolerance, sensitivity and pragmatism in its 2007 guidelines for managing religious attire worn by parties, witness, judges, jurors lawyers and incidental courtroom staff: "There is room for diversity, and there should be willingness to accommodate different practices and approaches to religious and cultural observance".

Empirical evidence highly suggested that the assessment of demeanor does not depend upon seeing the face or entire face of the speaker, most often ordinary people could not make an effective use of demeanor in deciding whether to believe a witness. It should be noted that jury could still assess veiled women's body language, delivery of her answer. It would be essential for justice system to weight the demeanour together with evidence.

By denying access to social justice no different than denying access to an education, in that regard, state could still accommodate veiling women in a courtroom by virtue of having female court staff or to analyze the degree in which wearing the niqab actually interferes with the evaluation of women's testimony. There are ways in which court could accommodate Muslim women's practice and balance the interest of the parties in a judicial system. How many cases judicial system actually face involving Muslim

¹⁸ Associated Press, New Rule Allows Michigan Judges to Control Witnesses' Dress, First AMENDMENT Ctr, July 18, 2009, <http://www.firstamendmentcenter.org/>

¹⁹ Anita L. Allen Veiled women in the women courtroom: Is the Niqab a Barrier to Justice? Electronic copy available at: <http://ssrn.com/abstract=1651140>

women who wears niqab?

Should there be guidelines for Case by case approach that suggested in Ontario court of Appeal? It is established that nature of the case is paramount in decision making of permitting the niqab wearing women to cover or uncover, In the case of sexual abuse, traumatizing experience and confronted by the abuser itself is huge pressure on the victim and on top of that, adding removal of veil can have negative impact on the victim, at the same time, victim might lose face in judicial system. Therefore, judges should have the ability to distinguish nature of the cases before them. As indicated in judicial study board, in ensuring a fair hearing judges should ask” what is required to enable women wear niqab to participate in legal process, to facilitate her ability to give her best evidence and to ensure, so far as practicable, a fair hearing for both sides? Forcing a women to choose between her religious and cultural identify and access to justice system impede justice and discriminatory.

In conclusion, asking a niqab-wearing woman to unveil maybe a simple request, but this simple request sends a larger message to Muslim community.it says that if these Muslim women want to participate in the justice system, they need to make personal concessions. If these women decline the concession, they will be, in part, excluded from our justice system. Canada and United States should live up to their multicultural heritage by encouraging judicial practices that enable as many people to participate and engage in justice system. A justice system should adopt all possible measures to accommodate veiled women. I am optimistic that a justice system can fully take into consideration what is needed to accommodate the full and meaningful participation of Muslim women.

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