Burqas in the Court Room: Voices from Behind the Veil

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# Introduction

Discourse about the wearing of the niqab and burqa (face veils) in western democratic countries notoriously ignores the views of the women most directly affected.[[2]](#footnote-2) Assertions are often made about women who wear face veils without actually consulting the women themselves or even knowing who they are.[[3]](#footnote-3) For example during the debate leading up the banning of public face veiling in France the French Cross-party Parliamentary Commission to Study the Wearing of the Full Veil ‘deemed it sufficient, after having heard the testimonies of more than 200 experts, to interview just one niqabi.’[[4]](#footnote-4) Women who wear the veil are therefore positioned as silent victims who must be liberated and for whom others must speak.

This absence can also be seen in the literature examining the court decisions on whether or not a Muslim woman may wear a face veil while giving evidence in in a common law court. Over the course of the last decade there have been a number of cases across the common law world where Courts have been asked to decide whether or not a witness may give evidence while wearing a face veil (burqa cases).[[5]](#footnote-5) In each case the Court has ordered the witness to appear without their veil. In the wake of these cases a substantial literature has sprung up examining these cases from a number of angles. The majority of the literature focuses on issues such as the varsity of demeanour evidence, the right to freedom of religion, the right to a fair trial and the clash of these two rights. There is however a lack of literature specifically examining the views and experiences of the women involved in directly in these cases. The absence of research directly relating to the experience of face veil wearers in the court room is, in part, a function of the wider absence of research into the experiences of Muslims more broadly in common law court rooms.[[6]](#footnote-6) Preliminary work has however been conducted on the impact of face veils on juror decision making. Maeder, Dempey and Pozullo found that the mere presence of the veil had little impact on jury decision making.[[7]](#footnote-7) However the study used mock trial transcripts with verbal indicators of the presence of the veil and, as they acknowledged, ‘[f]urther research employing videotaped or live-action testimony is necessary to determine whether jurors’ perceptions are influenced by the witness’s veil, in terms of whether credibility can be determined when a witness’s face is covered.’[[8]](#footnote-8) While this study does not focus on the views of Muslim women it is at least a start in the process of examining the experience of these women in the common law courtroom, in this case by considering how their credibility will be perceived.

A small number of articles have considered the effect of the cases on face veil wearers generally. Bakht for example suggests that the effect may be to discourage veil wearers from reporting sexual assault as they may fear being required to unveil in order to see their attackers convicted.[[9]](#footnote-9) As she puts it the effect of forcing a sexual assault victim to remove her veil in order to testify ‘will be to literally strip her publicly and in front of her alleged perpetrators.’[[10]](#footnote-10) Walker has similarly emphases the potential negative impacts on Muslim women commenting that ‘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.’[[11]](#footnote-11) Finally Morley argues that the effect of the cases has been to caste veil wearers as outlaws and therefor beyond the protection of the law.[[12]](#footnote-12) These articles however consider the effect on veil wearers as a class, rather than as individuals, and do not specifically examine the views of the women involved in the cases. A number of articles do contain quotes from women involved in the various cases, however as with the articles referred to so far these quotes are usually included to highlight broader points and make arguments about the impact of Muslim women generally or in relation to the views of a specific witness in a given case rather than as a systematic examination of the views and experiences of veil wearers in the common law courtroom.

There is however a small, but growing, literature which explores the experience of face veil wearers more broadly, including in those countries where a ban on the wearing of the veil has been adopted or mooted. In most cases these studies have been prompted by debate about the place of face veils in the public sphere or the banning of face coverings. The study by Østergarrd et al in Denmark, for example was conducted at the request of the Government Ministry of the Interior in Denmark to inform the debate over the wearing of the veil.[[13]](#footnote-13) Research has also been conducted in the Netherland, [[14]](#footnote-14) England, France[[15]](#footnote-15), Belgium,[[16]](#footnote-16) and the United States.[[17]](#footnote-17) These studies will be drawn on in latter parts of this paper as a comparison point for the views expressed by the women involved in the cases.

This paper therefore, examines the voices of the women involved in the court cases which have considered the issues of the wearing of the face veil in court. In doing so it seeks to avoid the trap of speaking for these women. Instead it examines their opinions as part of the wider debate on the place of the niqab in the court and society. These views and opinions are compared to the views expressed the judges in the Burqa cases, the empirical literature on the views of face veil wearers generally and the wider literature on the face veil. However, before turning to the views of the women it is necessary to first examine the cases and the roles the women played in each.

# Part I - The Cases

In 2005 an Auckland District Court Judge ruled that two female witnesses would not be permitted to wear their face veils while giving evidence.[[18]](#footnote-18) In the decade since courts in the United States of America (USA), the United Kingdom (UK), Australia and Canada have similarly been asked to consider whether a Muslim woman may give evidence while wearing a face veil. There have so far been eight cases across these five jurisdictions. In each case the Court has ordered the woman to appear without her veil, although in some cases accommodations have been permitted to minimise her discomfort. While the Courts have all ostensibly reached the same conclusions the cases are all subtly different. The cases differ both in terms of the role the women occupied and the reasoning of the judges in reaching their conclusion. A detailed examination of the reasoning of the judges in each case is beyond the scope of this paper, this section will focus instead on differentiations in the role the women played.

Witnesses occupy a number of different roles depending on the nature of the evidence they are giving, the nature of the trial, the party they are called by and their relationship with the parties. While the Burqa cases all deal with witnesses the role played by the witnesses varied. For example Muhammad was the plaintiff in *Muhammad v enterprise Rent-A-Car*, the witness in *The Queen v D(R)* was the accused in a criminal trial and the witness in *R v NS* was the complainant in a sexual assault trial. Judges in the Burqa cases have acknowledged that the outcome, in terms of whether or not the witness would be permitted to wear the veil, may differ depending on the role of the woman concerned. For example Deane J in *R v Sayed* noted that:

In some circumstances, it may be the case that a witness's evidence is completely uncontentious and, although presented before the court, is not considered to be of such a nature as to materially add to the issue before the court.

For example, it may go to an uncontested issue such as continuity, or relate to a formal or technical matter that is not in dispute. In those circumstances, on occasion, a witness's evidence is read to the jury by consent. It is also the case that at times, although it would not appear to be a common occurrence, a witness's evidence is taken by audio link so that the witness is not seen by anyone in court.

One would think, as a matter of logic in the majority of cases where evidence is taken by audio link and the witness is not required to be physically present in court, but again, their evidence is not of a nature that is particularly contentious.[[19]](#footnote-19)

Similarly Marrocco J commented in the Ontario District Court’s judgement in *R v NS:*

One can also appreciate that the impact of veiled testimony will vary from witness to witness. In addition to personal differences, there will also be contextual differences. In the Razamjoo case, Mrs. Salim was a Crown witness. Her evidence was corroborative but not essential.[[20]](#footnote-20)

It is therefore important to examine the unique role of each of the women in the Burqa cases. As the table below indicates the women occupied a number with a number of different outcomes and configurations of factors.

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Cases** | Jurisdiction | Civil | Criminal | Appeal |  | Witness only | Accused (criminal) | Witness and party (civil) |  | Gave evidence | Didn’t give evidence  |
| Police v Razamjoo (2005) | NZ |  |  |  |  |  |  |  |  |  |  |
| Muhammad v Enterprise Rent-a-Car (2006) | USA |  |  |  |  |  |  |  |  |  |  |
| Re S (2006) | UK |  |  |  |  |  |  |  |  |  |  |
| The Queen v Sayed (2010) | Aust |  |  |  |  |  |  |  |  |  |  |
| Ahmed v Ahad (2011) | UK |  |  |  |  |  |  |  |  |  |  |
| R v NS (2010 - 2012)  | Canada |  |  |  |  |  |  |  |  |  |  |
| The Queen v D(R) (2013) | UK |  |  |  |  |  |  |  |  |  |  |
| AAN v The Secretary of State for the Home Department (2014) | UK |  |  |  |  |  |  |  |  |  |  |

## Criminal Law Cases

Four of the eight cases were criminal trials; two for fraud[[21]](#footnote-21), one relating to witness intimidation[[22]](#footnote-22) and one relating to sexual assault.[[23]](#footnote-23) In two cases the women were merely witnesses, in one she was the accused and in one the victim.

In the Canadian case *R v NS* the witness was also the complainant in a sexual assault trial. She alleged that the two accused, one of whom she was related to while the other was a close family friend, has assaulted her while she was a child. The assaults had been reported at the time, but her family had declined to press charges. In the intervening years NS had begun to wear the face veil regularly. In this caseNS technically appeared merely as a witness, however she was also the complainant in the context of a sexual assault trial. As such she was a particularly vulnerable witness due to her status as both the member of a religious minority and as a victim of sexual assault. Bakht in particular has highlighted this aspect of the case and is particularly critical of the Court’s treatment of the witness in light of her status as a sexual assault victim. However this aspect of the case was not considered in detail by the Court.

In *Police v Razamjoo* and *R v Sayed* the women appeared merely as witnesses. In *R v Sayed* the accused, who was later found guilty, was charged with fraud in connection with claims for government payments to a private schools. He was the director of Muslim Link Australia which ran the school. The witness had been a teacher at the school and had been asked to give evidence regarding the children who attended.[[24]](#footnote-24) In *Police v Razamjoo* there were two witnesses. Mrs Salim was the wife of another witness, Mr Salim who the defence claimed was entirely responsible for the fraud. The second witness was the sister of the defendant who had, at the time of the alleged fraud, been living with the Salim’s.[[25]](#footnote-25) The Prosecution proposed to call both women to confirm the evidence given by Mr Salim which implicated Razamjoo in the fraud.[[26]](#footnote-26)

In *The Queen v D(R),* in contrast to the other criminal trials, the woman was both the accused and a potential witness in her own defence. As a result the Court had to decide the duel issues of whether the accused in a trial could sit in Court with her veil on during oral argument and testimony along with the question of whether, if she chose to give evidence, she would be permitted to do so while wearing her face veil. The Court held that she would be permitted to wear her veil while sitting in the dock, but would be required to remove it if she gave evidence. In the end she elected not to give evidence in her own defence. It is unclear if this decision was the result of being required to unveil or whether she was simply exercising her rights as the accused. Either way the possibility that she did not give evidence because she was not permitted to wear the face veil makes the decision in this case particularly poignant. In the other three criminal trials the need for the defence lawyers and jury to see the witnesses face during cross examination in order to afford the defendant a fair trial was a significant factor in the judge’s decision. However in this case it was the defendant who wanted to cover her face. This raises the spectre that she was denied a fair trial, not because the jury could not see her face but because she was prevented from giving evidence in her own defence.

## Civil Law Cases

The remaining four cases all involved civil cases. In *Muhammad v* *Enterprise-Rent-A-Car* the action was a dispute over a charge for damage to a rental car.[[27]](#footnote-27) *Re S* was a family law case concerning a forced marriage and an application for a decree of nullity while *AAN* involved and immigration matter and *Ahmed v Ahad* involved a property law dispute. Like the criminal cases discussed above the women in the four civil cases occupied a variety of roles. In *Muhammad* and *Re S* the woman was also the applicant. *Muhammad*  was seeking relief from charges for damage to a rental car which she disputed while *S*  was seeking a decree of nullity for a marriage which she claimed she had been forced to enter after being taking to Tanzania by her family.[[28]](#footnote-28)

In *AAN* and *Ahmed* the witness was not a party to the proceedings. In *AAN* the witness was the older sister of the applicant. As McCloskey J described it, the cornerstone of the applicant’s case was that he was at risk if he returned to Afghanistan because of his sister’s marriage and therefore ‘[t]he evidence of the veiled, female person claiming to be this sister was, self evidently, of substantial importance to his case.’[[29]](#footnote-29) In A*hmed* the witness was the wife of the defendant. The comments by the trial judge about her are complicated by the fact that he also took a dim view of her use of an interpreter commenting that she ‘shielded her evidence by means of an interpreter although clearly she could speak a certain amount of English.’[[30]](#footnote-30) While this assessment of the witness is concerning in and of itself, it is beyond the scope of this paper to consider the use of interpreters and the perceptions judges may form as a result of their use.

## Appeals

Half of the cases involved an appeal while half only involved a decision at first instance. In *Police v Razamjoo*, *The Queen v Sayed, The Queen v D(R)* and *Re S* the decision of the judge at first instance was not appealed, although in the case of the first three at least it would have been open to the witnesses to do so. By contrast in *Muhammad* and *R v NS* the witness appealed the decision of the first instances judge. In the case of *R v NS*  the case made it all the way to the Supreme Court of Canada. In *AAN* and *Ahmed* the women in question had already given evidence while wearing the face veil and the issue was raised on appeal.

*Muhammad v Enterprise Rent-a-Car*  began in the small claims court in Michigan where Judge Paruk order Muhammad to remove her veil. She refused and the case was dismissed without prejudice. Muhammad challenged Paruk J’s decision in the Federal District Court in *Muhammad v Paruk.* Feikens J dismissed her appeal on the basis that:

This kind of review also threatens to increase the tension between our state and federal courts and weighs against exercising jurisdiction over Muhammad’s declaratory judgment action for denial of access to the courts.

The importance of the relationship between our federal and state courts and the extent to which this factor is implicated in this suit compel me to decline to exercise jurisdiction over Muhammad’s declaratory judgment action.[[31]](#footnote-31)

Muhammad subsequently filed an appeal with the sixth circuit, but withdrew the appeal before oral arguments could be heard.[[32]](#footnote-32)

*R v NS* is perhaps the most famous of the Burqa cases, in part because it is the only case to make it all the way to the highest court in the relevant jurisdiction. *R v NS* began as a decision of Justice Weisman which determined that the witness would be required to remove her face veil in order to give evidence on the basis that, inter alia, her beliefs were ‘not that strong.’[[33]](#footnote-33) The witness appealed this decision to the Ontario Superior Court of Justice where Marrocco J quashed the original decision and ordered that:

The preliminary inquiry judge should conduct a hearing, within the preliminary inquiry, to resolve the issues created by the defendants' application and the applicant's objection to removing her veil.[[34]](#footnote-34)

Two issues must be resolved. Firstly, the court must determine the applicant's reasons for believing that she must wear her veil. The applicant should be a witness and should be permitted at this point to testify wearing her veil. To require its removal at this stage would prejudge the matter. The applicant's evidence should be received on oath or affirmation. Counsel for the defendants and the Crown should be permitted to question the applicant. His Honour should call the applicant as a witness. All of the applicant's reasons, religious or otherwise, are relevant and should be explored.[[35]](#footnote-35)

The witness then appealed this decisions, taking it to the Ontario Court of Appeal. Doherty JA, on behalf of the Court determined that:

I would affirm, albeit on different grounds, the order of the Superior Court justice quashing the order of the preliminary inquiry judge…. I would remit the matter to the preliminary inquiry judge for the completion of the preliminary inquiry.[[36]](#footnote-36)

NS then further appealed this decision to the Supreme Court of Canada. In a majority judgement the Court dismissed the appeal and returned the matter to the preliminary trial judge.[[37]](#footnote-37)

It is interesting to contrast these cases with those in which the witness did not appeal. In *Police v Razamjoo*, *The Queen v Sayed, The Queen v D(R)* and *Re S* the first instance judge offered the witness alternative arrangements to appearing in open Court without her veil. For example in *Police v Razamjoo* Judge Moore ordered that:

… screens may be used to ensure that only Judge, counsel, and Court staff (the latter being females) are able to observe the witness's face. Appropriate ancillary arrangements are to be made so that when the witness is entering and leaving the courtroom the intent of this decision is not defeated. Counsel and Court staff will understand that it would be a grave breach of their duties to the Court to convey to any third party (including the defendant) a description of the facial features or hair of any witness to whom this order is applied.[[38]](#footnote-38)

…

Provided a witness's face is fully exposed to view, the Court has no objection to her expressing her religious sensibilities by wearing a hat or scarf which covers her hair. Dark glasses would not be acceptable.[[39]](#footnote-39)

By contrast in *R v NS* and *Muhammad* the first instance judge simply ordered the women to appear without her veil, offering her no option of compromise. It is therefore arguable that the offer of compromise and accommodation by the first instance judges may have satisfied the women involved and they therefore felt no need to appeal the Court’s decision.

*AAN* and *Ahmed* also involved appeals. However in contrast to *R v NS* and *Muhammad* the women had already given evidence while wearing their veils. In *Ahmed* the wearing of a face veil by the witness is referred to briefly in a quote from the reasons of the original trial judge, Cowell J. In the wider quote Cowell J expresses dissatisfaction with the quality of the Oral evidence presented at trial.[[40]](#footnote-40) However the judges in the appeal make no comment on the issue and the appeal was determined on other substantive matters.

By contrast in *AAN* the question of whether or not the witness should have given evidence while wearing her face covering was a central issue in the appeal. The Upper Tribunal found that as a consequence of a failure to enquire whether the witness could give evidence without her veil and a failure to raise the issue of the effect the wearing of the veil may have on the ability to assess the evidence the tribunal hearing was procedurally unfair.

It is clear from paragraph of the Determination that the veiled attire of an important witness became a source of concern for the Tribunal. The substance of this concern is understandable: the FtT found it difficult to evaluate certain photographic evidence on account of her veiled attire. This, in turn, had a bearing on the Tribunal's evaluation of other evidence, in particular a marriage certificate. We consider that it was incumbent on the FtT, in the interests of fairness, to ventilate this concern, with due sensitivity and tact, in the presence of the parties. However, this did not occur. Secondly, we consider that the dictates of a procedurally fair hearing required the FtT to make sensitive enquiries about whether the witness could testify without the veil or partially veiled. No such enquiry was made. Thirdly, we are of the opinion that fairness required the FtT to give consideration to the acceptability and viability of a mechanism such as simple screening or limiting the courtroom audience. No consideration was given to this kind of device. We conclude that these failures rendered the hearing procedurally unfair.[[41]](#footnote-41)

## Appearing in Court

The outcome of the Burqa cases, in terms of whether or not the women involved ultimately gave evidence, also varies. In *Muhammad, Re S*  and *The Queen v D(R)* the decision was within the parties control. As applicants and accused these women had the right to choose not to give evidence or to withdraw their cases. While this ‘choice’ may ultimately have led to a denial of justice or relief and therefore may have been no real choice at all*,[[42]](#footnote-42)* the women were not at risk of further legal sanctions for refusing to comply with the judge’s order. By contrast in the remaining cases, where the woman was merely a witness, they may have risked being held in contempt of Court had they failed to comply with the judge’s order. Ultimately the women in *Police v Razamjoo*, *Re S, The Queen v Sayed* all gave evidence without their veil with accommodations in place to limit the number of men that could see their face. Only the women in *Muhammad v , R v NS, The Queen v D(R)* did not give evidence. As discussed above, in *Muhammad* the case was dismissed without prejudice after her refusal to unveil and in *The Queen v D(R)* the woman involved exercised her right as the accused not to give evidence.

In light of the Supreme Court’s decision in *R v NS* the witness ultimately agreed to compromise and give evidence however the prosecution decided not to proceed with the case before she had an opportunity to do so.[[43]](#footnote-43) The witness was reported to have been extremely disappointed with this decision. Her lawyer, David Butt, told the media that:

She is extremely disillusioned that she will not even have an opportunity to have her allegations heard on their merits … I’m probably only stating the obvious to say that these lengthy proceedings took an immense personal toll on her. … At some point perhaps in the future she may well wish to speak, and perhaps speak quite loudly, about… how those who self-identify as having suffered childhood sexual abuse are treated by the court system.[[44]](#footnote-44)

 While the judgments have unanimously held that the witness in that case must remove her veil in order to give evidence this does not mean the women never appear in court while wearing a face veil. As already identified two of the women in the Burqa cases had already given evidence while wearing their face veil and this was, inter alia, the subject of an appeal.

Guidance by the UK judicial Studies Board published in 2007 contained the comment that:

It is worth emphasising 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, depending on all the circumstances.[[45]](#footnote-45)

This would seem to indicate that woman have in the past given evidence while wearing a face veil, it may not have been a regular occurrence but it appears to have happened. However the current United Kingdom Equal Treatment Bench Book contains no substantive guidance on the issue of face veils.[[46]](#footnote-46)

A more concrete example of a woman appearing in court while wearing a face veil occurred in Queensland in 2013. In June 2013 a Queensland Magistrate questioned whether a defendant could wear a face veil during sentencing.[[47]](#footnote-47) During proceedings Magistrate Costello questioned the defendant’s dress commenting:

Could I just note your client appears – is it a full burqa? What’s she wearing? What is that – what is that described as. Is it head to toe? I can only see the eyes of the defendant.[[48]](#footnote-48)

In reply the accused’s lawyer, Mr Saggers, indicated that he had never seen his client in any other garment, that she was a Saudi national and that usually she had attended meetings with him with her husband.[[49]](#footnote-49) Magistrate Costello then commented that:

I just wonder of the appropriateness in Court. This is Australian Court and I do query the validity of the defendant wearing a full burqa in court.[[50]](#footnote-50)

However the accused was not required to remove her veil nor was she required to speak or give evidence, as in this instance her appearance was for sentencing only.[[51]](#footnote-51)

Women have also appeared in Court in other roles while wearing a face veil. As Bakht has identified, woman wearing face veils may appear in court rooms in a number of roles. These include as advocates, court room staff, witnesses, defendants, jurors and judges.[[52]](#footnote-52) However there have been relatively few reported cases involving women in roles other witness or defendant. This may indicate either that there have been no substantial issues when women have appeared in court wearing a face veil in these other roles or, as is more likely, very few women have yet attempted to fill these roles while wearing a face veil. One instance where the issue was raised involved UK lawyer, Shabnam Mughal. In 2006 she was requested by a judge to remove her veil while representing a client before the Asylum and Immigration Tribunal. The judge reportedly made the request on the basis that he could not hear her. However as Bakht put it [p]erhaps 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'[[53]](#footnote-53) or perhaps to suggest that the advocate wear a microphone clipped to her veil.

This was not the first time that Ms Mughal had appeared in court with her veil. As explained by a senior partner from the firm she worked for:

This doesn't reflect in anyway on her ability or on whether she can or cannot wear a veil in court. Nothing has changed as far as that is concerned. She has worn the veil in courts around the country before without a problem.[[54]](#footnote-54)

Ms Mughal was however taken off the case and replaced by a male lawyer. Her firm sated that he decision to do so was made in light of the publicity surrounding the case and in the interest of the client.

It is not an issue of us backing down. We represent clients and our duty is to make sure that their interests are at the forefront of our mind. The decision was made in the interests of our client, given all the publicity.[[55]](#footnote-55)

It is unclear how often women have appeared in court while wearing a face veil or how often the issues has been raised by the parties or judge. It is however, evident that some women have appeared in Court in a face veil without serious incident. It is also clear that in some cases the face veil has been raised as an issue but that this has been resolved without significant media attention or appeals. It is also likely, especially in light of the decisions in the Burqa cases, that some women who would normally wear the face veil may have appeared in Court without their veils in the belief that they would not be permitted to wear it. Some women may have been advised by their lawyers that this would be the likely outcome of any request.

# Part II – The Women’s Voice

The opinions and experiences of Muslim women are often conspicuously absent from public debate about issues that directly affect them. This silence does not mean, however, that they do not have a voice. This section of the paper seeks to examine that voice and bring it to the fore. Rather than speaking for these women it employs direct quotes to include the voice of face veil wearers in their own words. In doing so it sheds light on their experiences in the Burqa cases.

## Source of Women’s Views

The views of the witnesses involved in the Burqa cases are taken from two main sources. First the women’s views are taken from comments made by the witness during the course of the cases. In *R v NS* and *Police v Razamjoo[[56]](#footnote-56)* the first instance judge held a *voir dire* in which the witness gave evidence as to their reasons for wanting to appear in court while wearing their veil. While no separate *voir dire* was held in *Muhammad v Enterprise rent-a-car* an exchange between the judge and witness as to her beliefs took place in open court and provides a valuable source of comments from the woman involved in this case.

These primary sources are supplemented by comments from the women recorded in media reports. The witnesses in *R v NS*, *Muhammad v Enterprise Rent-a-car* and *R v Sayed* all made statements to or participated in interviews with the media at various points during or after the trial. As such these comments are a useful source of the women’s views contemporaneous to their involvement in the case. The most extensive statements come from the witness in *R v Sayed* who both gave interviews during the court process and issues a statement after Deane J handed down her decision.

It is not possible to examine the views of all of the women involved in the burqa cases. In most cases the women were not given the opportunity to give evidence as to their beliefs. In *The Queen v D(R)* Murphy J explicitly rejected taking evidence from the witness as to the sincerity of her beliefs.[[57]](#footnote-57) He did so for three reasons:

First … he practice of the courts must be uniform; they cannot vary between different cases or between different locations of the Crown Court. … If judges sitting in different cases or at different locations took different approaches with respect to whether or not a defendant may wear the niqaab in court, the result would be a kind of judicial anarchy. There must be a single practice, which does not depend upon the individual defendant. …

Second, if the Court sought to explore the question of sincerity with every defendant, it would necessarily involve the Court in entering into a religious debate with the witness, which would be unseemly, and might even smack of a religious inquisition.

Third, it would from a practical point of view, be impossible for a judge to determine with consistency with what degree of sincerity such a choice is made by different defendants. Such a decision would be highly subjective. … [[58]](#footnote-58)

Further not all of the women made statements which were reported in the media. As a result there are no comments from the witness involved in *Re S*, *The Queen v D(R), AAN* or *Ahmed*.

While interviews with these women may have provided additional insight the focus of this article is on the views expressed by the women at the time of the Burqa cases, some of which are now over a decade old. Views expressed after the fact are likely to have matured from those expressed at the time. While these women are likely to be difficult to contact interviewing the women involved in the Burqa cases may provide an avenue for future research.

The views of the witnesses in the burqa cases are supplemented by comments from two Muslim lawyers, both of whom were required by judges to remove their veils while appearing in Court: Raees Anjum, a lawyer from Pakistan and Ms Mughal a lawyer in the UK.

## Why Wear the Veil?

The witnesses involved the Burqa cases have expressed two main reasons for wearing the face veil. First, and most prominently the women connect the wearing of the veil with modesty, particularly in front of non-male relatives. Second the women saw the veil as part of the relationship with Allah / God. Some of the women also explicitly rejected any argument that they were forced to wear the veil or were in any way oppressed by their husbands or other male relatives. These views are consistent with findings by researches in Europe who have investigated the views of Islamic Face Veil wearers following the debate around the veil in Europe and the implementations of bans in some countries.

### Modesty

*I wish to respect my religion and so I will not take off my clothes[[59]](#footnote-59)*

A common theme in the views expressed by the women involved in the Burqa Cases is that the veil is an important part of their modesty. Most strikingly Muhammad was adamant that: ‘I wish to respect my religion and so I will not take off my clothes.’[[60]](#footnote-60) Raees Anjum, a lawyer who was told to remove her veil by a judge in Pakistan, expressed a similar view, if in less colourful language, saying:

‘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 woman’s modesty.’[[61]](#footnote-61)

NS described the wearing of the veil as an issue of modesty saying ‘the objection is very strong. It's a respect issue, one of modesty and one of - in Islam, we call honour.’[[62]](#footnote-62)

A related view expressed by the women is that they did not want to expose their face to men in open court. The witness in *The Queen v Sayed* for example questions ‘why must I be exposed in front of all these men when I am just a witness?.’[[63]](#footnote-63) The witness in *R v NS* expressed similar concerns. NS’s position as the alleged victim made her involvement more central than the witnesses in *The Queen v Sayed*; however it also heightened her concern about exposing her face. *R v NS* was a sexual assault trial and the accused were men with whom she and her husband interacted, she would normally have remained veiled in front of them and was distressed at the prospect of unveiling in their presence.

The religious reason is to not show your face to men that you are able to marry. It's to conceal the beauty of a woman and, …, we are in a courtroom full of men and one of the accused is not a direct family member. The other accused is a direct family member and I, … would feel a lot more comfortable if I didn't have to, …, reveal my face. …, just considering the nature of the case and the nature of the allegations.[[64]](#footnote-64)

After being told to remove her veil so that the made judge could assess her demeanour the witness in *Muhammad v Enterprise –Rent-A-Car r*equested to appear in front of a female judge stating,

I don’t have a problem with taking my veil off if it’s a female judge, so I want to know do you have a female that I could be in front of then I have no problem but otherwise, I can’t follow that order.[[65]](#footnote-65)

Judge Paruk then explained that there was no female judge available and gave the witness two choices, remove her veil and proceed with the case or have the case dismissed.[[66]](#footnote-66) She maintained her refusal and the case was dismissed without prejudice.[[67]](#footnote-67)

Similarly in *Re S* the witness was concerned about exposing her face in open court, including in front of her own male council, while giving evidence.[[68]](#footnote-68) However she was willing to expose her face to the female judge, facilitating a compromise in that case. This case is important as it highlights that the issue is not so much modesty generally but rather modesty in front of men which these women seek to achieve. Given the dominance of men in the legal system it is unsurprising that these women found themselves in a situation where the judge, their council or the other party’s council were male.

Modesty and the desire to not expose their faces to men in open Court seems to have been accepted by some judges in the Burqa cases, as a reason why the women refused to remove their veil, or requested to give evidence while wearing it. Judge Dean in *The Queen v Sayed* accepted the assertion that the witness in that case wore the veil as a form of modesty and that modesty was an essential part of Islam:

This, it is said, is part of her religious belief which I understand from argument to mean that it is the particular way in which she, as an individual, chooses to interpret and practise this aspect of Islam relevant to preserving female modesty.[[69]](#footnote-69)

Female modesty is an important part of Islam, and the covering by a female of her face in one form or another is an aspect of observing this modesty[[70]](#footnote-70)

Judge Murphy in *The Queen v D* also accepted that the witness’s practice of wearing the face veil was related to her desire to not show her face to men to whom she was not related.[[71]](#footnote-71)

I accept for the purposes of this judgment that [the defendant] sincerely takes the view that, as a Muslim woman, she either is not permitted or chooses not to uncover her face in the presence of men who are not members of her close family.[[72]](#footnote-72)

The views expressed by the women in the Burqa cases is also consistent with the empirical research. Moors, for example, found that women she interviewed ‘generally acknowledged the rule that women need to wear a face veil if in the company of non-mahram men.’[[73]](#footnote-73) Several women in Bouteldja’s study reported that they began to wear the veil as a way to avoid unwanted male attention, harassment and comments.[[74]](#footnote-74) For example one women reported that she began to wear the face veil after a particular unpleasant interaction with a non-Muslim man:

I was walking to take my son to school. I [was] … wearing these clothes and covering my hair and this dirty man …you know like a man who is breaking his neck to see this women. This is exactly how this man was looking at me … I felt so violated, I felt disgusted, I was so upset.[[75]](#footnote-75)

Similarly women interviewed by Østergaard et al saw the wearing of the veil as ‘[living] up to an ideal of Muslim behaviours which, …, is to hide her beauty to the outsider and avoid attention and inappropriate glances.’[[76]](#footnote-76)

However the requirements with in Islam for men and women to dress modestly and the wearing of the face veil to achieve this has been criticised as inconsistent in western countries. Face veils are relatively rare in western countries and therefore the wearing of the veil draws attention to wearer, rather than divert attention from her.[[77]](#footnote-77) As one women interviewed by Shirazi and Mishra explained ‘[b]eing in public with such dress attracts more attention and defeats the entire purpose of *hijab*.’[[78]](#footnote-78) However none of the women in this study wore the face veil at the time of the interviews.

While modesty appears to be an important factor it is far from the only factor behind women’s decisions to wear the face veil. Often their views evolve over time and for many women ‘taking up face veiling could not simply be reduced to the desire to conceal one’s body from the gaze of men. The women underlined that to them wearing a face veil is above all an act of worship and a means to express their love for God.’[[79]](#footnote-79)

### Relationship with Allah

*[l]ike many Australians I believe in God and for me wearing the niqab serves as a constant reminder that I am accountable for my actions.[[80]](#footnote-80)*

As would be expected with a religious practice many of the women expressed the view that the wearing of the veil was required by their faith or was related to their relationship with Allah. The witness in *The Queen v Sayed* for example commented that ‘[l]ike many Australians I believe in God and for me wearing the niqab serves as a constant reminder that I am accountable for my actions.”[[81]](#footnote-81) Similarly Mohammad linked her refusal to remove her veil to her desire to respect her religion. *[[82]](#footnote-82)*  Mrs Salim, one of the two witnesses in *Police v Razamjoo*, also linked her desire to wear her veil to her faith stating ‘if I uncover my face then I would be in trouble with God.''[[83]](#footnote-83)

Religious motivations for wearing the face veil are also a consistent theme across the empirical studies as the strongest motivator for women’s decision to wear the veil. Moors,[[84]](#footnote-84) Østergaard et al,[[85]](#footnote-85) Brems et al[[86]](#footnote-86) and Bouteldja[[87]](#footnote-87) consistently found that the majority of the women interviewed expressed religious motivation for wearing the veil. For example Moors found that the women in her study “all used a strongly religious discourse to explain how they had moved towards longer, looser and more covering styles of dress with the face veil as the last step or something extra.’[[88]](#footnote-88) Similarly Brems et al found that the women interviewed ‘[wanted] to be as pious Muslims as possible, by applying not only mandatory religious rules, but also the rules that are recommended.’[[89]](#footnote-89) As one women put it ‘[w]e believe that you get good points from Allah. Hassanat we call that. Indeed when you do it, you’re in a higher rank with Allah.’[[90]](#footnote-90) Similarly one of the women interviewed by Moors explained that wearing the face veil “is a way to get closer to God, it is a way to experience again the intense feeling of being in love with Islam.”[[91]](#footnote-91)

In most cases the wearing of the veil was recognised by the Court as a religious practice triggering the Court to consider whether requiring the witness to remove her veil while giving evidence would impinge upon her freedom of religion. Moore J, for example, in *Police v Razamjoo* commented that ‘[v]eiling allows for a public declaration of the acknowledgement of the authority of tradition and surrender to Allah.’[[92]](#footnote-92) However this recognition is not universal. Judge Paruk in *Muhammad v Enterprise-Rent-A-Car* asserted that unlike a headscarf the wearing of a face veil was ‘more of a custom thing.’[[93]](#footnote-93)

A common argument put forward in support of a ban on the face veil more generally is that it is not a religious practice but a cultural one.[[94]](#footnote-94) Australian politician Jacqui Lambi for example, a proponent of a ban in Australia, has asserted that she had ‘been assured that the need to wear the burqa is not written in the Koran’.[[95]](#footnote-95) In *Police v Razamjoo* the defence suggested that ‘no spirituality could be attached to wearing it’ as the ‘Koran did not suggest that it was compulsory for women to cover themselves’ and that ‘the burqa was seen by the rest of the world as symbolic of the crushing of women.’[[96]](#footnote-96)

While there was a high level of recognition of the religiosity of the wearing of the veil in the Burqa cases several judges also commented on the optional nature of the wearing of the veil. Murphy J in *The Queen v D* for example commended that ‘it is a matter of common observation on the streets of London, on any day of the week, that not all Muslim women wear the niqab. Many, indeed it would seem, the majority, go out in public with their faces uncovered.’[[97]](#footnote-97) In addition to this anecdotal evidence Murphy J relied on evidence in an expert report from Professor Edwards, information from the Muslim Council of Britain and comments by Baroness Hale in the *Denbigh High School Case[[98]](#footnote-98) t*o support his assertion that ‘whether or not there is an obligation to wear the niqab is not a subject of universal agreement within Islam; rather, it is a choice made by individual women on a personal basis.’[[99]](#footnote-99)

Similarly in *The Queen v Sayed* Dean J commented 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.’[[100]](#footnote-100) The witness at the centre of this case acknowledged that her decision to wear the face veil was not one shared by other Muslim women and that this may be confusing.

I respect that other women who share my religion do not share this particular belief and that interpretations surrounding Islamic dress standards do differ. Therefore I understand this can be confusing for non-Muslims as they witness varying degrees of cover and I accept the full cover I choose to wear can be confronting to some.[[101]](#footnote-101)

The judges in these cases were correct to highlight the diversity of opinions within Islam in relation to veiling. Early in Islam’s history a diversity of views emerged as to the role and extent of veiling of women.[[102]](#footnote-102) The requirement for some form of veiling for Muslim women is based on two verses of the Quran.

And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and to wrap [a portion of] their headcovers over their chests and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed. Quran 24:31

O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful. Quran 33:59

However these verses are ambiguous, in that they do not specifically outline what must be covered. For example adornment (*zeena*), head-covers (*Khimar*) and outer-garments (*Jilbab*) are not defined or further described and could be interpreted in several different ways.[[103]](#footnote-103)

Those who interpret these verses of the Quran to include the covering of the face usually rely in addition on verses directed at the wives of the Prophet. For example the Quran states:

O wives of the Prophet, you are not like anyone among women. If you fear Allah , then do not be soft in speech [to men], lest he in whose heart is disease should covet, but speak with appropriate speech.

And abide in your houses and do not display yourselves as [was] the display of the former times of ignorance. And establish prayer and give zakah and obey Allah and His Messenger. Allah intends only to remove from you the impurity [of sin], O people of the [Prophet's] household, and to purify you with [extensive] purification. Quran 33: 33- 34

While these verses appear to be directed only to the wives and household of the Prophet those who support the wearing of the face veil argue that the wives of the Prophet should be examples of pious behaviour and therefore their example should be followed. [[104]](#footnote-104) Women in Bouteldja’s study of face veil wearers in France and England cited the example of the Prophet’s wives as the inspiration for their own veiling. [[105]](#footnote-105) As one interviewee put it:

Given the proof from each scholar, I think that for a woman it’s not compulsory. But for me the best example are the wives of the Prophet. I know they were dressed in this manner and I try to follow them *insh Allah*, in their clothes or in what they do.[[106]](#footnote-106)

In addition to the Quran many scholars rely on the *Hadith*, the oral tradition of the sayings and actions of the Prophet, to support the wearing of the face veil. However as with the Quran the *Hadith* can be interpreted in a variety of ways.[[107]](#footnote-107)

As a result of the ambiguity in the Quran and the *Hadith* and the diversity of human interpretations a variety of veiling practices are followed across the Muslim world; from women who only appear in public while completely covered, including their hands and face, to women who forgo a veil entirely.[[108]](#footnote-108)

While there is significant disagreement within the Muslim world about veiling fatwas (religious ruling) have been issues stating that the wearing of face veils is compulsory for Muslim women. Shakhs Ibn Uthaimin and Ibn Jibreen, two prominent Saudi Islamic scholars, have issued fatwas to this effect.[[109]](#footnote-109)

There is a danger, however, in relying on this diversity with in Islam in judicial decisions about freedom of religion. Reference to disagreement with in Islam, while correct, may have the tendency to undermine the veracity of the witness’s own beliefs. The judges appear to be suggesting that as face veiling is not considered compulsory by all Muslims the witness has got her religion wrong. This is not an approach that should be endorsed by the Courts. Religious belief and practice is endlessly diverse. Even within the one faith there may be huge diversity as to whether a particular practice is permitted, recommended or obligatory. In *Eweid and others v The United Kingdom* the European Court of Human Rights accepted that the wearing of a cross as a neckless was a religious practice. The Court found that in order for a religious belief to be protected under article 9 of the *European Convention of Human Rights* the ‘the act in question must be intimately linked to the religion or belief’[[110]](#footnote-110) but ‘there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.’[[111]](#footnote-111) As such even if the Quran did not contain any verses relating to religious dress, a belief by these women that their understanding of Islam required them to dress in a particular way would qualify as a religious belief, regardless of any debate within Islam on the matter. There is no references to the wearing of the cross or crucifix around the neck in the Christian Bible, yet this was capable of classifying as a religious practice for the purposes of article 9.

### Oppression

*This is my personal choice and rather than oppressing me, it liberates me.[[112]](#footnote-112)*

A common argument advanced in support of ban on the wearing of Islamic Face Veils is that the veil is oppressive to women.[[113]](#footnote-113) France, inter alia, made this argument before the European Court of Human Rights in support of their ban on the face veil.[[114]](#footnote-114) It is unsurprising, therefore, that this argument was raised in the Burqa cases. In *Police v Razamjoo* the defence argued that ‘the burqa was seen by the rest of the world as symbolic of the crushing of women.’[[115]](#footnote-115) However in *The Queen v D(R)* Murphy J explicitly rejected the argument that the veil was ‘nothing more than a form of abuse, imposed under the guise of religion, on women by men.’ While he accepted that ‘[t]here may be individual cases where that is true’ he ultimately concluded that ‘the niqaab is worn by choice by many spiritually-minded, thoughtful and intelligent women, who do not deserve to be demeaned by superficial and uninformed criticisms of their choice.’[[116]](#footnote-116)

These views are consistent with the views expressed by the women themselves. The witness in *The Queen v Sayed* felt that far from oppressing her, the veil liberated her.[[117]](#footnote-117) She was adamant that the wearing of the veil was not a ‘restriction imposed by her husband, rather a personal choice she made at age 17.’ [[118]](#footnote-118)

Despite the persistence of the argument that the face veil is oppressive to women the empirical evidence would suggest that the majority of women who wear the veil do so of their own free will. The literature shows an almost universal rejection this argument by the women themselves.[[119]](#footnote-119) While many women reported that their husbands were involved in their decision to wear the veil or were pleased by it – none reported that they wore the veil at their husband’s request alone.[[120]](#footnote-120) For example one woman in Brems study wore the face veil for the first time as a way to surprise and please her husband, not because he required it but because she wanted to:

My husband never wanted to pressure me, for him it was something he held dearly, that he loved a lot, but … the wife in the wearing of the face veil has to feel really very well in what she does … And, so when we started living together, I presented the matter a little bit as a surprise. The first time we went out together, I was ready, prepared, I took out my sitar and I put it on. So my husband was pleased and I was also very please.[[121]](#footnote-121)

By contrast another women reported that her husband was clear that if she chose to wear the veil she was doing it for herself and should not do so merely to please him:

My husband was surprised, but he said If you wear that, you can do that if you want it yourself, but don’t think you have to do it for me. If you want that, it is a nice extra, but don’t think it is mandatory.[[122]](#footnote-122)

In fact the researches in several studies found that in some cases husbands were resistant to their wives wearing the veil.[[123]](#footnote-123) Many husbands feared for their wives’ safety in the context of a society which view Islam and veiling in a negative light.[[124]](#footnote-124) Such concerns are not unfounded. A Significant proportion of the women who wear the veil have experienced hostile reactions while in public, including verbal and physical violence and attempts to remove their veil.[[125]](#footnote-125) For example one woman in England reported that she would regularly be abused with comments such as:

Go back to your country! They’ll call you a black bitch. They’ll say You effing nigger, You Batman. They’re very nasty, they’ve got dirty language.[[126]](#footnote-126)

Another reported an incident where a driver deliberately wound down her car winder to abuse her:

This person looked like a very educated women in her ca with a man sitting next to her in a suit and everything … she actually rolled her car [window] down in the middle of all the traffic to tell me to eff off and go back home. … I was more British than some of these people. At least I’ve got better manners.[[127]](#footnote-127)

Some of the women in Østergaard et al’s study did indicated that they were dependant on their husband’s because they wore the niqab. However they did not wear it because they were dependant on or oppressed by their husbands. Their dependence resulted from the fact that they felt it would be impossible to gain employment or an education in Denmark as a result of the negative connotations and restrictions on wearing the veil.[[128]](#footnote-128) It was not their husbands who were oppressing these women but wider Denmark society.

## Negative Experiences and Perceptions

*When I walked out, I just really felt empty, like the courts didn't care about me[[129]](#footnote-129)*

*The voice of the rogue computer in 2001 A Space Odyssey quickly came to mind as an example of a voice conveying some sense of character but without an effective physical presence to fill out one's sense of a person.[[130]](#footnote-130)*

Appearing in a court case can be a negative and distressing experience for many people. Perhaps unsurprisingly then the women in the Burqa cases commonly expressed negative sentiments about their involvement in the court process. However this negativity appears to have been heightened by both the media attention surrounding the cases and a feeling that they religious beliefs, and therefore they as women, were not being respected. While negative views from witnesses about their court experiences are perhaps unsurprising the regularity with which judges expressed negative sentiments about the women and their attire is. Similarly arguments put to the court by the parties opposing the witnesses wearing of the veil were in some cases little more than Islamophobia rants with little legal substance.[[131]](#footnote-131) While unfortunate this is perhaps unsurprising given wider public sentiments surrounding the face veil in general and its place in the Court room in particular.

The women involved in the Burqa cases commonly expressed negative sentiments such as regret,[[132]](#footnote-132) embarrassment,[[133]](#footnote-133) disillusionment[[134]](#footnote-134) and a sense of injustice[[135]](#footnote-135) in relation to their involvement in the cases. In an interview on the step of the courthouse in Detroit Muhammad expressed her dissatisfaction with the outcome in her case stating:

I'm a human being and I wanted to come to court to get justice … When I walked out, I just really felt empty, like the courts didn't care about me.[[136]](#footnote-136)

The witness in R v *NS* felt similarly dissatisfied. As her lawyer reported:

She is extremely disillusioned that she will not even have an opportunity to have her allegations heard on their merits … I’m probably only stating the obvious to say that these lengthy proceedings took an immense personal toll on her.[[137]](#footnote-137)

Both women were denied their day in Court: Muhammad because the judge refused to proceed if he could not see her face and NSbecause the prosecution decided not to proceed with her case even after she had agreed to compromise and appear without her veil.

Morley has likened the outcome and implications of the Burqa cases to the case of Baron Carlde Gleichen.[[138]](#footnote-138) In 1857 the Baron was unable to give evidence against men who had robbed him as he did not believe in ‘reward or punishment according to his desserts.’ As an atheist he could not take a Christian oath and as a result could not give evidence leading to the acquittal of those who assaulted him. As John Stuart Mill put it the result was to ‘exclude from the protection of the tribunals’ those who did not profess a belief in God which result in them being able to be ‘robbed or assaulted with impunity.’[[139]](#footnote-139) Morley then argues that as a result of forcing the women in the Burqa cases to choose between their faith and their legal rights they are in effect being put beyond the protection of the law. As he put it ‘[t]he effect will be to render those women outlaws – cruelly ironic in light of the usual objection to the niqab as oppressing those very same people.’[[140]](#footnote-140) He further argues that ‘we owe [these women] very good reasons if we are to expert [them] to recognise the legitimacy of a system that allows violence against her to remain unpunished.’[[141]](#footnote-141) Muhamad and NS would undoubtedly agree with this conclusion. While the decision was taken out of NS’s hands as a result of the nature of her case Muhammad was in effect forced to give up her right to the protection of the law in order to respect her strongly held religious beliefs. The witness in *The Queen v* D(R) similarly had to choose between respecting her faith or giving evidence in her own defence, like Muhammad she appears to have chosen the former.

While the negative sentiments expressed by the women are perhaps expected, given that in every case the court ruled in favour of the removal of their veil, negative sentiments are not expected from judges in a common law system. Judges are expected to be impartial, unbiased and measured in their approach. While I do not wish to suggest that any of the judges in these cases were in any way biased there was however a surprising number of negative comments about the women and the face veil expressed in their written judgments. Judge Cowell for example, in *Ahmed v Ahad* commented that:

…the defendant’s wife was called but she hid beneath a burka and shielded her evidence by means of an interpreter’[[142]](#footnote-142)

In *Police v Razamjoo* the witnesses give evidence in a *voir dire* while wearing their veils. This afforded Judge Moore the opportunity to assess how their evidence would be received during the trial if he ruled in their favour. Despite reluctantly finding that ‘there could be a fair trial even if Mrs Salim and other witnesses of like belief gave evidence wearing their burqas’ Moore ultimately ordered the women to give evidence without their veils, although he did permit alternative arrangements to be put in place to minimise their discomfort. However his description of hearing evidence while the witness wore a veil contain significant negative overtones. In his judgment he commented that:

A sense of the witness's character emerged, though much more slowly than is usual when a witness can be seen. There was however still a strong sense of disembodiment, far greater than arises in receiving evidence by video link or the playing of an evidential videotape. It was all slightly unreal. The voice of the rogue computer in *2001 A Space* *Odyssey* quickly came to mind as an example of a voice conveying some sense of character but without an effective physical presence to fill out one's sense of a person. A telephone call from a complete stranger provides another example.[[143]](#footnote-143)

The comparison with the ‘rogue computer’ from *2001 a Space Odyssey* is hardly positive. In that movie, the rogue computer Hal was responsible for the murder of the human crew members and is represented through an ominous blinking red light. In likening the witness to the fictional computerised villain the women are being position as inhuman and threatening, as disconnected and distant. While this may have been the impression he gained, Judge Moore would have been safer to stick to his alternative analogy of ‘[a] telephone call from a complete stranger.’[[144]](#footnote-144)

## Compromise and Choice

*[I]t is a matter of common observation on the streets of London, on any day of the week, that not all Muslim women wear the niqab. Many, indeed it would seem, the majority, go out in public with their faces uncovered.’[[145]](#footnote-145)*

In many of the Burqa cases the court explored weather and if so when the women were prepared to remove their veils. Judge Dean for example in *R v Sayed* noted that:

The witness removed her niqab in only limited circumstances, including: when required to undergo passport checks at airports, to have her photograph taken for her driver’s licence, and in the comfort of her own home.[[146]](#footnote-146)

 She is also an Australian citizen who wore her niqab at the citizenship ceremony.[[147]](#footnote-147)

Similarly in *Police v Razamjoo* Moore J commented:

Significantly, Mrs Salim indicated a sense of reality as to when necessity had to prevail over expressions of belief and customary habits. She was photographed for her driver's licence with her face uncovered (though her husband was not with her at the time and unaware that had occurred). If one of her children were knocked over in the street outside her home she would not pause to don her burqa before going to assist the child.[[148]](#footnote-148)

In adopting that solution the Court has been mindful of evidence indicating the likelihood of Mrs Salim's beliefs admitting of some relaxation in relation to being unveiled in the presence of relatively aged male authority figures as opposed to males generally.[[149]](#footnote-149)

The willingness of these women to be flexible in certain circumstances to allow them to participate in civil society can however been used against them in deciding whether or not they would be permitted to wear the veil while giving evidence. In the first instance decision in *R v NS* Weisman J made extensive reference to the fact that the witness was prepared to have her driver’s license photograph taken without her veil. He, therefore, concluded that her religious beliefs were ‘not that strong’.[[150]](#footnote-150) In coming to this conclusion he referred to the US case *Freeman v The Department of Highway safety and Motor Vehicles* in which the Florida District Court of appeal held that Freedman was required to remove her face veil for the purposes of her driver’s license photograph.[[151]](#footnote-151) Weiman J in particular commented that:

It may be one thing for a female photographer to take the picture but that driver’s license can be required to be produced by all sorts of males all the way from police officers and border guards to numerous people who simply ask for your driver’s license for the purposes of identification …, an so it did not satisfy me as the trier of fact that it was consistent with the strength of [NS’s] belief to be content to have her have unveiled on a driver’s license open not only for the female photographer to see but for numerous males in modern society.’ [[152]](#footnote-152)

NS was prepared to remove her veil in some circumstances. During the *voir dire* she was specifically question on this point. She initially indicated that she only revealed her face infront of family members, and never in public. In answer to the question of when she was without her veil NS replied:

Only with family members. So people that you are not allowed to marry. So, family, brother, father in law. Dads, brothers, moms brothers and women, all women an children.[[153]](#footnote-153)

She was later cross examined on when she was prepared to remove her veil. Her answers revealed that wherever possible she sought out females to minimise the instances when she would e required to unveil in front of men, for example she had a female doctor.[[154]](#footnote-154) As indicated in Weisman J’s comments above she had similarly sought out a female photographer for her driver’s license photograph.[[155]](#footnote-155) Further, while she had a Canadian passport the photo had been taken before she began to wear the face veil.[[156]](#footnote-156) The whole tone of the questions appear to be trying to catch the witness out in revealing that she had in fact revealed her face to a man. For example she was asked in relation to the procedure for the taking of her driver’s license photo:

And in the public office there would have been males present either members of the public or other staff members?

…

 Would any of them have been able to see you?[[157]](#footnote-157)

Her answers however were remarkably consistent. She insisted that she had not unveiled to a man in the five years since she had begun to wear the veil. In response to the question ‘Since the past five years or thereabouts has it ever happened that you have revealed your face to a male other than direct family, friends and circumstances?’ with a simple ‘No’.[[158]](#footnote-158) She was not asked her views in relation to the viewing of her photograph on her driver’s license by men.

The New South Wales Ombudsman considered this issue in its review of the New South Wales laws, introduced in 2011, which gave police the power to request a person to remove their face covering for the purpose of identification. The Ombudsman noted that while some women were uncomfortable with have a man view their photograph ‘[o]ther women did not have a strong objections to a man seeing their identification photo.’[[159]](#footnote-159) The reason given for this disparity, between being prepared for a man to see their photograph but not their face, was that they perceived the viewing of their actual face to be more intimate. Women also noted that they ‘may be wearing more jewellery or other adornments, or make up, than on the day her photo was taken. This meant that the man looking at her face could see extra adornments only meant to be viewed by her husband, that he would not have been able to see if he only checked her photo.’[[160]](#footnote-160)

The women in the cases would, however, appear to be at the more strict end of face veil wearing women in terms of the circumstances in which they are prepared to remove the veil. In each case the women describe only very limited circumstances where they are will or have been required to remove the veil after they started wearing it on a regular basis. By contrast women in research conducted in Europe evidenced a range of views as to where and when they would be willing to remove the veil. As Moors identified:

Individual women wear face veils with different levels of consistency. Whereas they generally acknowledge the rule that a woman need to wear a face veil if in the company of non-mahram men, only a small number is willing or able to follow this rule consistently; many more recognize that they do not always do so. Some wear a face veil most of the time, but allow for exceptions, such as, for instance, when they visit their parents, or when their school or employer prohibits face veiling. Others only wear a face veil at particular occasions, such as when they visit the mosque.[[161]](#footnote-161)

Bouteldja similarly found that many of the women she interviewed in England and France would remove their veil for work or when visiting family members who were uncomfortable with their choice to wear the veil.[[162]](#footnote-162)

This is not to suggest that the women in the Burqa cases are in some way extreme or uncompromising. Rather that they may represent a subset of face veil wearers. Women who are more accustomed to removing their veils at work or when visiting family may not request to wear the veil when appearing in court, perhaps assuming that such a request would be denied. Given the negative media attention surrounding the face veil generally, and the Burqa cases specifically, such an assumption is understandable. In light of decisions in the Burqa Cases it may be the case that we will see very few additional cases as lawyers and advocates advise their clients and witnesses that they will need to unveil when appearing in court.

# Conclusion

While the voices of Muslim women have been historically silent in western discourse about their interests these women can and do express their views. In the context of the Burqa cases these views can be gleaned from both court transcripts and media interviews conducted at the time of the cases. In these transcripts and interview the women explain not only their reasons for wearing the veil but also their experience of doing so and their experience of attempting to do so in a western common law court room.

Consistent with the literature the women in the Burqa cases wear the face veil for both modesty and as part of their commitment to Allah. They also reject the oft repeated argument that they are oppressed, instead the witness in *The Queen v Sayed* saw the veil as liberating. This too is consistent with the literature. It is not the wearing of the face veil that causes these women distress, rather they were distressed by being denied their day in court or by being required to appear in court in a way that was uncomfortable for them.

The answer however does not lie in necessarily allowing Muslim women to give evidence with their face covered. Instead the Court and judges must approach this issue with sensitivity and creativity. As the Judicial Studies board put it:

Tribunals should be considerate and respectful in their approach. They should also be resourceful and imaginative in their quest to explore and discover solutions…. a Tribunal's experience, expertise, common sense, pragmatism and sense of fairness will be invaluable tools.[[163]](#footnote-163)

In those cases where the court demonstrated flexibility in allowing the women to give evidence with alternative arrangements in place they did not appeal the first instance court’s decision. By contrast where the Court presented the matter as an either or approach the women appealed, and in the case of *R v NS* took the matter all the way to the Supreme Court of Canada. Four decisions latter she still did not get her day in court as the prosecution withdrew the charges against her alleged abusers. By listening to these women we can better understand their experiences and arrive at solutions, which while not perfect, accommodate as far as possible their religious beliefs while at the same time provide a fair and open trial for all concerned.

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