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Dr Helen O’Nions, Nottingham Trent University, Burton Street, Nottingham, NG1 4BU. Telephone 0115 941 8418. Ms O’Nions can also be contacted on the following e-mail addresses: helen.o'nions@ntu.ac.uk. Style notes and further details about the *Journal* are available on request.

Intending subscribers should please contact Ms Carole Vaughan at the above address. Intending subscribers in North America are advised to contact Wm W Gaunt & Sons. Inc, Gaunt Building, 3011 Gulf Drive, Holmes Beach, Florida 3417 2199.

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*Extract from *Refusing the Veil*, 2014. Published with kind permission of Biteback Publishing, London.

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EDITORIAL

I am very pleased to introduce Volume 25 of the Nottingham Law Journal. I hope you will agree that this is a particularly strong issue with a diverse and stimulating range of contributions. Our articles of contemporary legal significance include something of interest to international lawyers, contract lawyers, public lawyers, sports lawyers and those working and researching in the field of intellectual property.

Professor Mark Pawlowski and Dr James Brown explore how contract law applies in auction sales, a hitherto unexplored field of enquiry and, by their own admission, ‘no easy task’. An entirely different field, albeit equally unexplored and intricate, is examined by Visar Morina from the University of Pristina in his analysis of the role of precedent in Kosovan constitutional courts. Our third article sees Simon Boyes extending his considerable knowledge of sports law to investigate the legal position of sports regulatory bodies. Finally, Dr Janice Denoncourt combines theory and practice in an interdisciplinary consideration of how best to protect the creative identity through intellectual property law.

Our thematic articles arise from a symposium held at Nottingham Law School in March 2015 on the legal implications relating to the ban on the face veil which became the subject of a particularly contentious European Court of Human Rights’ decision in *SAS v France*. The section includes submissions from highly respected academics and legal practitioners who critically examine the reasoning and impact of the Court’s judgment through perspectives grounded in personal autonomy and religious freedom. A contrasting and reliably challenging angle is provided by the feminist, Muslim journalist, Yasmin Alibhai- Brown, who views the veil as a ‘rejection of progressive values’. The papers are introduced by director of the Centre for Conflict, Rights and Justice at Nottingham Law School, Tom Lewis.

As is customary I would like to extend my sincere gratitude to all the contributors, reviewers, subscribers and readers of the Nottingham Law Journal. Particular thanks are owed to my assistant editor, Janice Denoncourt who not only managed to offer her own erudite contribution to this edition but was also called upon at the eleventh hour to review a case commentary from the Paris Court of Appeal. Additionally I wish to thank Louise Taylor for checking my proof-reading, thus enabling me to dilute my own accountability for any editorial errors. Finally, as ever, I need to thank our administrative assistant, Carole Vaughan, who keeps the wheels in motion.

DR HELEN O’NIONS

ARTICLES

The address for submission of articles is given at the beginning of this issue.

HOW MANY CONTRACTS IN AN AUCTION SALE?

JAMES BROWN* and MARK PAWLOWSKI**

ABSTRACT

The article seeks to (1) examine the various forms of contractual relationship which may come into existence as a result of a traditional (face to face) auction sale; (2) consider specifically the selling of land at public auction with a view to advocating a change in the law requiring the formality of writing for sales contracts of land for both private and public auctions, and (3) compare briefly the contractual elements of an online ascending model of auction sale epitomised by the eBay phenomenon.

INTRODUCTION

Making sense of auction sales, in terms of English contract law, is no easy task. Despite the common perception of hammers hitting blocks, signifying the creation of the basic sale contract,¹ a typical auction sale necessarily involves the making of several forms of contract other than the obvious primary sale agreement. The purpose of this article, therefore, is threefold, namely, to (1) examine these various forms of contractual relationship² which may come into existence as a result of a traditional (face to face) auction sale; (2) consider specifically the selling of land at public auction with a view to advocating a change in the law requiring the formality of writing for sales contracts of land for both private and public auctions, and (3) compare briefly the contractual elements of an online ascending model of auction sale typified by the eBay phenomenon.

NATURE OF AUCTION SALES

Despite the lack of any formal statutory definition of an auction sale, *Halsbury's Laws of England* states that “[an] auction is a manner of selling or letting property by bids,

*LL.B (Hons), Ph.D, FHEA, Barrister, Senior Lecturer, Business School, Aston University. **LL.B (Hons.), BCL (Oxon), ACI Arb, SFHEA, Barrister, Professor of Property Law, School of Law, University of Greenwich. The writers wish to express their gratitude to Franklin Meisel for his initial suggestions for this article.

¹ See, *Payne v Cave* (1789) 3 Term Rep 148 and s.57(2) of the Sale of Goods Act 1979, which states that: “a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until the announcement is made any bidder may retract his bid”.

² It is not proposed to examine the relationship between seller and auctioneer as this will depend on principles of agency and whether the auctioneer has express or apparent authority to act on behalf of his principal.

usually to the highest bidder by public competition”.³ This is the so-called “ascending bid” form of auction, and this article is concerned predominantly with this type of auction where the same is attended by a group of potential bidders/purchasers.

Auction sales have been around for a long time.⁴ Perhaps the most direct historical comparison to current practice of the ascending auction can be traced back to the Roman auction, indeed the word “auction” is derived from the latin *augere* and *auctum*, meaning “to increase”.⁵ In England, according to Harvey and Meisel, chattel auctioning can be traced back to just after the Restoration period.⁶ Land auctions in the UK, on the other hand, seem to have become established by the mid-18th century, with the first reported case involving a purported land auction appearing at this time.⁷ It is to this period that the first major British auction houses can trace their origins. For example, the first recorded auction at Sotheby’s took place in 1744 and Christies was founded not long after in 1766.⁸ Today, the auction sale is routinely employed in the sale of commodities, plant and industrial equipment, land, artwork, antiques and other personal property. Undoubtedly, this form of sale has become an important aspect of English mercantile practice.

ECONOMIC BENEFITS OF AUCTION SALES

Selling land or chattels by way of auction sale is arguably a more economically efficient way of selling property than by the normal route of private treaty where goods are offered for sale at a fixed price and presented for sale on a “take it or leave it” basis. An auction sale positively encourages a healthy system of barter. Further, because auction sales occur only at a specific time and place, buyers in attendance will be focused on achieving a fair price for the property in question. The atmosphere of competitive bidding can generate potentially a better price than an ordinary open market sale. The auction environment, therefore, creates a window of opportunity for the micro-economic factors of supply and demand to play themselves out in a more intensive way. The presence of two (or more) eager potential buyers can force up the price of the property in question to a figure way above its normal market value.

THE ROLE OF THE AUCTIONEER

An auctioneer acts as an agent of the vendor of the goods or land to be sold at the auction. His role, however, extends beyond simply conducting the auction. In the case of a sale of land, he will act on behalf of the vendor in a similar way to an estate agent involving himself in each step of selling the property from pre-inspection to final contract signing. He may also be a valuer or surveyor. In particular, the auctioneer will

³ *Halsbury’s Laws of England*, (4th edn, Reissue, Butterworths) para 201. It is noteworthy that, in addition to the “ascending bid” auction, alternative forms of auction also exist, for example, the “Dutch auction” and variants of the same, (based on the competition of descending bids) and sealed bid arrangements. For a full discussion of the various types of auction: see, B.W. Harvey and F. Meisel, *Auctions Law and Practice*, (3rd edn, Oxford University Press 2006) paras 1.02–1.04. Further, for a useful discussion of the history of auctions in the UK: see, Harvey and Meisel, above, at paras. 1.05–1.11.

⁴ *Ibid* para. 1.05, cite Herodotus, who by his writings refers to auctions existing around 500 BC in ancient Babylon, the transactions being concerned with the yearly sale of women of marriageable age.

⁵ See, Harvey and Meisel (n3) para. 1.06 and, more generally, J.A.C. Thomas, ‘The Auction Sale in Roman Law’ (1957) 1 *Jur R* (April) 43.

⁶ Harvey and Meisel (n3) para 1.08.

⁷ See, *Daniel v Adams* (1764) Amb 495 and Harvey and Meisel (n3) para 1.10.

⁸ Harvey and Meisel (n3) para.1.13 and 1.14. Interestingly, a third major UK auction firm/auction house, namely, Phillips, Son and Neale, can also trace its origins back to the mid-18th century.

normally evaluate the property for sale by auction, gathering and compiling the necessary information for the auction catalogue featuring relevant photographs, descriptions and guide prices. He will also be responsible for advertising and promoting the auction and making potential buyers aware of the properties on offer.

THE “FOUR BASIC CONTRACTS” MODEL

In terms of a typical auction sale, four basic contracts underpin the auction process. First, there is a contract between bidders *inter se*, what can be termed as the “taking part contract”. Secondly, there is a contract between the auction house and each individual bidder. Thirdly, there is the sale contract itself which exists between the bidder whose bid is accepted and the seller. Fourthly, there is the potential for a separate (or collateral) contract to exist between auctioneer and highest bidder where the auction involves the sale of a lot without reserve.

(a) *the taking part contract*

This form of contract exists between the bidders *inter se*, and is analagous to the contract position which arose in *The Santiana*.⁹ Here, both claimant and defendant entered their respective yachts in a regatta race. In doing so, they agreed to be bound by the sailing rules of the Yacht Racing Association. One of these rules provided that the owner of any yacht “disobeying or infringing any of these rules . . . shall be liable for all damages arising therefrom”. In breach of one of the rules, the defendant’s yacht ran into and sank the claimant’s yacht. The collision occurred without fault on the part of the defendant. It was held that the parties had accepted a contractual obligation not to disobey the sailing rules with the result that the defendant was liable to the claimant for the loss suffered as a result of the breach and further, that the effect of the agreement between the parties was to displace the limitation on liability which would otherwise have been applicable as a result of the application of a statutory provision.

It is noteworthy that the dispute here was not one between one of the competitors and the organisers of the competition. Rather, it was between two of the competitors. Moreover, the issue related to the terms of the contract concluded between the competitors. Although the court gave no clear answer as to when precisely the contract was formed between the competitors,¹⁰ there was no doubt that a contractual relationship existed between the parties. Significantly, Lord Herschell stated:

I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.¹¹

It is submitted that the position of each bidder at an auction sale is not dissimilar. Arguably, when a bidder attends an auction and acquires an auction catalogue containing the auction’s standard conditions, each bidder individually contracts with all the other bidders to abide by the conditions. Each individual bidder provides consideration by agreeing to be bound by the common auction rules. In short, a multiplicity of

⁹ [1895] P 248, (CA), affirmed sub nom *Clarke v Dunraven* [1897] AC 59, (HL).

¹⁰ Lord Esher MR stated that the competitors “were bound when they began to sail and not before then”. Lopes LJ concluded that “the contract arose directly any owner entered his yacht to sail” and Rigby LJ stated that “the contract was created when the parties actually came forward and became competitors”.

¹¹ [1897] AC 59, 63.

individual contracts arise between each bidder at the auction and all bidders are deemed to play the “bidding game” by the auction rules.

As in *The Santiana*, it might be difficult to pinpoint the precise time of offer and acceptance in this contract between bidders, but arguably a contract *inter se* exists in much the same way as a contract between the competitors in a yacht race. Bidders enter the “bidding race” by attending the auction and impliedly contract to be bound by the auctioneer’s common conditions so as to be given the opportunity to enter bids for the property to be sold. Thus, for example, if one bidder deliberately excludes another bidder from the auction room causing the excluded bidder to miss his chance to bid for a particular lot, the bidder who has been so denied could arguably sue the offending bidder in contract and recover damages. These damages would represent the “lost chance” of securing the property to be sold at auction.¹² To take another example, if one bidder conspires with others to drive up the price artificially so as to deprive another bidder of his opportunity to secure the purchase of a lot, damages for the loss of a chance could be claimed against the conspiring bidders with those damages being apportioned equally between those responsible.¹³ It will be seen that this “taking part contract” is necessary in the context of an auction sale so as to protect the economic interests of each bidder against any breach of the auction conditions (or other wrongdoing) committed by fellow bidders. Essentially, the contract represents the legal mechanism which ensures that all bidders at the auction play by a common set of mutually enforceable rules.

Apart from contractual redress, the practice of so-called “bid rigging” may be the subject of criminal prosecution under English law. The Auction (Bidding Agreements) Acts of 1927 and 1969 make it a criminal offence for dealers to give an inducement or reward to any person for abstaining from bidding at a sale by auction and for any person to accept the inducement or reward. The seller may also avoid the contract of sale and the members of the ring will be jointly and severally liable to compensate the seller for his loss. The Enterprise Act 2002, on the other hand, makes it a criminal offence to participate in a “bid-rigging arrangement”. Although the offence is directed primarily at contractors, who in the course of a tender process agree to fix prices, the provisions of the Act apply equally to an auction where there is an agreement amongst the potential bidders that one (or some) of them will abstain from bidding (or that they will bid in a certain way) and the effect of such an agreement is to distort competition. Whilst the Act required the prosecution to show that the members of the arrangement had acted dishonestly, this element of the offence has since been removed by the Enterprise and Regulatory Reform Act 2013. Finally, an arrangement between bidders designed to restrict competition at auction may fall within the ambit of the Competition Act 1998.

Despite this considerable body of legislation, the criminal and regulatory law has been largely ineffective in dealing with bid rigging. Only a handful of reported prosecutions have been successful, which may be partly attributable to the fact that both the Auction Acts and the Enterprise Act afford a defence to participants in bidding

¹² See, *Chaplin v Hicks* [1911] 2 KB 532. Arguably, the fractional lost profit (if any) on any such purchase would be ascertained by calculating the basis for such a profit and dividing the same between the number of bidders taking part. If damages for any loss of a chance proved to be incapable of quantification or inapplicable, the bidder could, in the alternative, claim his damages on a “reliance basis” (i.e., damages representing the cost of any outgoings, catalogue/registration fee, travel costs, etc., as money laid out in advance of the taking part contract). See generally, *Anglia Television v Reed* [1972] 1 QB 60, CA.

¹³ Presumably, in such a situation the deprived bidder could sue one of the conspiring bidders (the one most able to pay) for breach of the “taking part contract” and claim damages for his lost chance (or, alternatively, for his reliance losses). The sued bidder could then presumably claim a contribution against the other conspiring bidders so as to apportion this loss between them all: see, *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270, Court of Exchequer. The tort of civil conspiracy may also have been committed in this scenario. Again, the damages would represent the injured bidder’s lost chance of any *pro rata* profits which could have been gained from the bidding.

arrangements if they provide certain information in writing to the auctioneer before the bid is made. Contractual sanctions, therefore, are likely to continue to play a significant role in protecting the interests of innocent participants at auction until such time as a new regulatory framework is put in place to deal specifically with objectionable bidding practices.

(b) contract between the auction house and each bidder

As well as entering into a multiplicity of individual contracts with each of his fellow bidders, a bidder also enters into a separate auction contract with the auction house itself. In terms of consideration, the auction house allows the bidder to take part in the auction according to its sales conditions in return for which the bidder (by taking part in the bidding) helps force up the price and provides the auction house with the opportunity to earn its commission. It goes without saying that, without a competitive group of bidders, there would be no auction, and without an auction, the auction house would not be able to earn its commission by bringing about the relevant sale.

If, therefore, the auction house fails to entertain a genuine bid put forward by a bidder and awards the sale of the lot in question to another rival bidder for less than that which was offered, the former may bring an action against the auction house for damages for breach of contract. These damages would represent the loss of profit (if any) on any purchase which should have been obtained by the bidder in question or, alternatively, the disappointed bidder could claim his reliance losses (i.e., any expenditure he has laid out in advance of the commencement of the auction). If a bidder is ignored and the property is sold for the same price to another, then again the ignored bidder's damages would represent the same lost profit (if any) which could have been earned if his bid had been properly accepted. Alternatively, the disappointed bidder may again be entitled to reliance loss damages.

If, having ignored the genuine bid, the auction house in breach of contract sells the lot for more than what was offered, the ignored bidder may claim damages for his lost chance of being able to purchase the property as a result of being barred from the bidding. If it is not possible to quantify this lost chance, arguably the ignored bidder has suffered no loss and would have no claim for any expectation damages despite the breach of contract. Presumably, however, he could seek to protect his reliance interest and, accordingly, claim his pre-contract expenditure.

The contract which exists between the auction house and each bidder (on an individual rather than co-contracting party basis) is clearly necessary to protect the economic interests of each bidder. Essentially, each and every bidder should be permitted an equal opportunity to take part in the auction on the condition that he abides by the auctioneer's auction conditions.¹⁴

(c) seller/bidder sale contract

Contract lawyers will be more than aware of the main sale contract which comes into existence between the seller and successful bidder when the auctioneer accepts the highest bid for a lot in the customary manner of hitting the hammer on the block.¹⁵ This orthodoxy suggests that, by striking the block, the auctioneer accepts the bidder's offer to purchase the lot in question.

¹⁴ If a bidder fails to abide by the auctioneer's terms and conditions and his bid is not entertained by the auctioneer, this would presumably permit the auction house to "accept" the breach as bringing the contract with the bidder in question to an end, with the result that the auction house would be released from considering his particular bid: See, *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

¹⁵ *Payne v Cave* (1789) 3 Term Rep 148 and s. 57(2) of the Sale of Goods Act 1979.

A distinction, however, needs to be made between those auctions where there is a “sale *with* reserve” and those where there is a “sale *without* reserve”. The position is relatively straightforward in the case of auctions held *with* a reserve price.¹⁶ Here, the auctioneer, in inviting bids for a particular lot, makes an invitation to treat to the various bidders. The offer is then made by the relevant bidder. That bid is not usually accepted immediately. The auctioneer invites further bids to be made for the lot. If no other bids are forthcoming, the auctioneer will accept the bid on the fall of his hammer.¹⁷ It is at this point that acceptance of the offer by the auction house (on behalf of the seller) takes place and the contract of sale is struck. Moreover, where a lot is subject to a reserve price, arguably the auctioneer cannot withdraw the lot once the reserve price has been reached.¹⁸ Thereafter, it would seem that, once the best bid has been achieved, the auctioneer accepts the same by the fall of the hammer.

It has also been held that an advertisement by an auction house to hold an auction sale with reserve on a certain day will not constitute an offer to potential bidders that the auction sale will actually take place. In *Harris v Nickerson*,¹⁹ the claimant failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was ultimately cancelled. His claim was condemned as “an attempt to make a mere declaration of intention a binding contract”.

(d) collateral contract between auctioneer and highest bidder

Where the auction sale is held *without* a reserve price, the contract law position is more complicated.²⁰ The dicta of three judges of the Exchequer Chamber in the 19th century case of *Warlow v Harrison*²¹ suggests that, in the case of an auction held without a reserve price, the auctioneer makes an offer to sell the lot and that offer is accepted by the bidder who makes the highest bid at the auction. Similarly, on this reasoning, an advertisement to hold an auction without reserve will amount to a unilateral offer to sell to the highest bidder which is capable of acceptance by any bidder complying with the terms of the offer.²² The situation is analogous to a contractor who makes a tender in response to an invitation for tenders. The tender is an acceptance of the offer to consider compliant tenders. It is important, however, to observe, that there is no *contract of sale* between the highest bidder and the seller of the property if the auctioneer refuses to accept the highest bid. The auctioneer, in these circumstances, is liable on a *separate* (or collateral) contract between him and the highest bidder that the sale will be without reserve. One surprising consequence of this analysis, however, is that, whereas there is no breach of contract if the auctioneer simply withdraws the lot from the sale before bidding commences, if instead he allows bidding to commence and then places a reserve price on the lot, he is in breach.

A contrary argument is that there is no separate or collateral contract because the auctioneer who holds an auction without reserve is merely making a request for bids from those participating at the auction. The offer, therefore, is made by the bidders and no contract is formed, in the same way as an auction for a lot with a reserve price,

¹⁶ This is where a price for a particular lot is reserved as the minimum acceptable price by the seller (i.e., a bottom line price).

¹⁷ *British Car Auctions v Wright* [1972] 1 WLR 1519.

¹⁸ See, Scott [2001] LMCLQ 334, 336–337.

¹⁹ (1873) LR 8 QB 286.

²⁰ This is where the “highest bid” constitutes the winning bid, whether its actual value is low or high.

²¹ (1859) 1 E & B 309. See also, *Harris v Nickerson* (1873) LR 8 QB 286, per Blackburn and Quain LJ.

²² *Williams v Carwardine* (1833) LJKB 101, (a reward case) and *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

until the fall of the hammer. The cases of *Harris v Nickerson*²³ and *Payne v Cave*²⁴ support this approach, although they can be distinguished on the grounds that they both involved auction sales which were not without reserve. There is also the Scottish case of *Fenwick v. MacDonald Fraser*,²⁵ which is persuasive on this point. Here, the claimant attended an auction sale and made a bid for lot 50, a bull. His offer of 42 guineas was the highest bid made at the sale of the lot and, accordingly, he was the purchaser in terms of the conditions of sale. The auctioneer then withdrew the lot intimating that there was a reserve price on it for 150 guineas. The Court of Session held that s.58(2) of the Sale of Goods Act 1893 (forerunner to s.57(2) of the Sale of Goods Act 1979, which stipulates that a sale by auction is complete when the auctioneer announces its completion upon the fall of the hammer) implied that the seller had the right to withdraw the lot at any time before the hammer falls. This was a corollary of the right of the buyer to withdraw his bid. Significantly, the statutory provisions make no exception for auction sales without reserve. Moreover, the auctioneer may have good reasons for withdrawing the lot. For example, let us assume that a bidder flies all the way from Australia to bid at the auction and is the highest bidder at the point at which the lot is withdrawn (because the seller decides to keep the lot after all). There has been no completed sale (in the orthodox sense) and yet the auctioneer is liable for the bidder's travelling expenses or, alternatively, the difference between what he bid and the actual value of the lot.

So far as English law is concerned, the point has since been clarified by the Court of Appeal in *Barry v Davies (trading as Heathcote Ball (Commercial Auctions) & Co)*,²⁶ where it was accepted that, where a lot was auctioned without reserve, the auctioneer would be in breach of contract to the highest bidder if he withdrew the lot from sale. Indeed, in this case, the Court went so far as to say that the withdrawal of the lot would constitute an unlawful bid by the auctioneer on behalf of the seller under s.57(4) of the Sale of Goods Act 1979. The facts are noteworthy. Customs and Excise put up two engine analysers for sale by auction without a reserve price. The price of new machines was £14,521 each. The claimant bid the highest price of £200 for each machine after the auctioneer had tried and failed to obtain bids of £5,000 and £3,000 for each machine. The auctioneer refused to sell the machines to the claimant for such a low price and they were later sold to a third party for £1,500 each. Interestingly, the claimant brought an action against the auctioneer for breach of contract, rather than the seller, Customs and Excise. The claim succeeded on the ground that there was a separate "collateral contract" between the auctioneer and the highest bidder²⁷ constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made.

The claimant was held to be entitled to recover £27,600 by way of damages, being the difference between the amount that the claimant had bid to purchase the machines (£400) and the amount he would have been required to pay to obtain the machines

²³ (1873) LR 8 QB 286.

²⁴ (1789) 3 Term Rep 148.

²⁵ (1904) 6 F (Ct. of Session) 850. Strictly speaking, the sale was not "without reserve" in this case because the auction conditions provided expressly for the right of the sellers to bid (albeit just once) for the lot. See also, *Mainprice v Westley* (1865) 6 B & S 420.

²⁶ [2000] 1 WLR 1962, CA.

²⁷ See, E. McKendrick, *Contract Law Text Cases and Materials*, (4th edn, Oxford University Press 2010) 80: "it was not a contract of sale between the buyer and seller. The effect of the auctioneer's action was to prevent a contract coming into being between the seller and the buyer." Arguably, however, there was such a contract between the bidder and the seller. Being the agent of Customs and Excise, the auctioneer had the authority of the seller to make the offer to sell to the highest bidder. That offer was accepted when the highest bid was made, resulting in a contract of sale of the machines at the price as between seller and the bidder. If the highest bid is acceptance in itself, this obviates the significance of the "fall of the hammer".

in the ordinary way (£28,000).²⁸ Given, however, that there was no *contract of sale* between the seller and the bidder, but merely a collateral contract to effect a contract of sale, the damages awarded appear misconceived. Arguably, all that the disappointed bidder has lost is the chance of obtaining the lot at the price which he actually bid. This chance may be said to have a value and the court should not reject a claim for damages simply because it may be difficult to assess.²⁹ In *Thomas Eggar Verrall Bowles (a firm) v Anthony Burnett Rice*,³⁰ for example, a prospective purchaser was wrongfully denied a chance to bid at auction. Rimer J awarded him damages based on the assessment that he had lost a 70 per cent chance of successfully bidding for a lot. He was, therefore, entitled to recover 70 per cent of the aggregate of the cost price of the stock plus the likely profit less the cost of acquisition. In *Barry*, however, this approach was unnecessary given that the claimant was the sole person willing to bid throughout.

What then was the consideration for the auctioneer's promise to sell the lot to the highest bidder? On this point, the Court of Appeal held that the highest bidder supplies the necessary consideration by performing the act of making the highest bid.³¹ This is a benefit to the auctioneer (as the price is driven up) and a corresponding detriment to the bidder in that he runs the risk of his bid being accepted. Another way of looking at this is to say that the auctioneer's offer to sell the lot without reserve is a unilateral offer to those bidding at the auction.³² The highest bidder provides consideration by simply performing the act of making the highest bid.³³ In *Barry*, Stuart-Smith LJ stated:

As to consideration, in my judgment there is consideration both in the form of detriment to the bidder, since his bid can be accepted unless and until it is withdrawn and benefit to the auctioneer as the bidding is driven up. Moreover, attendance at the sale is likely to be increased if it is known that there is no reserve.

On commentator, however, has expressed difficulty with this view in that "the bid made is a revocable one and this provides an insecure foundation for the finding of consideration for the promise".³⁴ In other words, if the bidder can withdraw his bid at any time before the fall of the hammer, how can this be a benefit to the auctioneer or a detriment to the bidder? Another unresolved question which arises from the *Barry* ruling is the precise moment at which the auctioneer makes the offer to sell the goods. Is it when the auction is advertised without a reserve price, or is it later when the auctioneer puts the lot up for sale at the auction? In *Barry*, the Court of Appeal did not address this question and academic opinion, it seems, is divided.³⁵

Finally, a more fundamental question arises as to whether the auctioneer in contracting to sell to the highest bidder is, in fact, acting as agent for the seller so as to make the latter liable under the collateral contract. Harvey and Meisel contend that:

... if an advertisement of a sale without reserve is made on the instructions of the vendor, there seems nothing in principle to prevent the court from holding that this constitutes an

²⁸ This represents the measure of damages awarded under s. 51(3) of the Sale of Goods Act 1979, where there is a failure by the seller to deliver the goods to the buyer. The two machines were, in fact, sold elsewhere for a total of £1,500. That sum, however, was held not to be the measure of the claimant's loss since it would not put him into possession (or in a position to obtain possession) of two brand new £14,000 machines. Significantly, the claimant was not a trader but wanted to use the machines in his own business.

²⁹ See, C.J. Slade, 'Auction Sales of Goods without Reserve' (1953) 69 LQR 21.

³⁰ Unreported, Ch D, 21 December 1999.

³¹ See also, F. Meisel, 'What Price Auctions Without Reserve' (2001) 64 MLR 468, 470, citing *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 25, (invitation for tenders).

³² See, L.C.B. Gower, (1952) 68 LQR 457.

³³ See, *Williams v Carwardine* (1833) LJKB 101 and *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

³⁴ E. McKendrick, *Contract Law Text Cases and Materials*, (4th edn, Oxford University Press 2010) 81.

³⁵ See, L.C.B. Gower, [1952] 68 LQR 238, at p. 241 and Scott [2001] LMCLQ 335.

offer by the vendor, as principal, to sell to the highest bidder made through the auctioneer merely as agent.³⁶

To this extent, therefore, there may be no real difference between the notion that the auctioneer is personally liable on the collateral contract but can look to the seller for an indemnity, and one that renders the seller primarily responsible on the contract as principal.³⁷

SELLING LAND AT AUCTION

Land may be sold at public auction³⁸ for a variety of reasons. For example, the sale may take the form of the sale of investment “ground rents” (i.e., reversions on long leases), or of commercial property, the value of which has to be realised because of liquidation or some other economic imperative. In many instances, the sale will involve a mortgagee seeking to sell residential property following repossession. Auction sales of land can also occur in other situations, for example, where the property to be sold is owned by an employer who needs to realise the same, having previously used it to house a previous employee or a current employee who has been relocated. Whatever the context, as a precursor to most public auction sales, the vendor will typically have received advice from his agents that sale by public auction represents the most efficient and effective way of realising the value of the land concerned.

*(a) the auction process*³⁹

A sale of land by public auction, as compared to an ordinary sale of land by private treaty, throws up different and unique problems of law and practice.⁴⁰ As far as the auctioneer is concerned, however, the preparation for the auction will not be dissimilar to the preparation of land sold by private treaty in so far as the auctioneer will act as agent for the vendor and will typically communicate with the seller’s solicitor who will be charged with the drawing up of a sale contract incorporating the standard (and any special) conditions of sale.

So far as the potential bidder is concerned, unlike a purchaser proceeding by private treaty, he will not know whether he has been successful until the auction has been held. Despite this uncertainty, a potential bidder must, in advance of the auction, be prepared for the consequences which flow from a successful bid. In this connection, he must make all the necessary standard searches preceding the signing of a binding contract and ensure that he has the appropriate finance in place so as to fund the purchase. For many, it will often be impracticable to proceed with a land purchase at auction where reliance is being placed on the sale of an existing property unless appropriate bridging loan facilities are in place. Additionally, many purchasers of domestic property will be dependent upon the availability of a mortgage which will often prove difficult to secure before the auction sale. That said, several steps can be taken to facilitate the conveyancing process. Thus, it is relatively common for the vendor’s solicitors to effect

³⁶ *Ibid* para. 3.46.

³⁷ If, on the other hand, the identity of the seller as principal is not disclosed, it is likely that the auctioneer would remain personally liable for withdrawing the lot.

³⁸ This article focuses on the sale of land at *public* auction. This is a common form of auction employed in this country. Whilst no formal definition exists, in broad terms a public auction can be defined as any auction which is open to the general public. By way of contrast, a private auction is one which is not open to the general public, but where the group of potential bidders is united by a common personal nexus to a person or organisation, such as members of a certain family or company.

³⁹ See generally Harvey and Meisel (n3) paras. 9.01–9.11.

⁴⁰ Here again, however, the auction sale may take the form of a sale of lots with a reserve price or without reserve.

local (and other) searches⁴¹ of the property before the auction and to make the results available to potential bidders. Also, standard enquiries before contract can be answered on a pro-forma basis.⁴²

Once a bid for the land has been accepted by the auctioneer, by the fall of the hammer, the successful bidder will be treated as having entered into a binding contract with the vendor. It is submitted, however, that this contract represents, in effect, a collateral contract with the vendor (or a “contract to contract”) to buy the land in question.⁴³ It is only after a bid has been accepted that the final stage of the auction process results normally in the parties entering into a written agreement, signed by both parties. This written agreement represents the formal contract of sale between buyer and seller of the land in question incorporating the general (and any special) conditions of sale.⁴⁴ Presumably, the practical need for evidential certainty with land sold at auction is the same as it is with land purchased by way of private treaty which necessitates a formal written contract of sale signed by both parties.

If the purchaser refuses to complete the purchase, he will be in breach of his collateral contract, for which the vendor may claim damages representing any difference between the price bid at the auction and any subsequent fall in the market price for the property. In this connection, the auctioneer may be instructed to place the property back into auction at the next available opportunity so as to mitigate the seller’s loss. If there is a shortfall in price at a subsequent auction, the difference between this shortfall and the accepted bid of the bidder in breach will necessarily represent the seller’s damages for breach of contract. If, on the other hand, a higher price is obtained at the subsequent auction, the seller would suffer no loss and merely nominal damages may be awarded to mark the breach.

Conversely, if the seller refuses to go ahead with the transaction, the purchaser would be well-placed to seek a decree of specific performance of the contract or, if a decree is refused, to claim damages in lieu under the Chancery Amendment Act 1858.⁴⁵

(b) the requirement of writing

The requirement for a signed written memorandum, as a necessary prerequisite to an enforceable contract for the sale of land, has its origins in s.4 of the Statute of Frauds 1677, which was replaced and replicated in s.40(1) of the Law of Property Act 1925.⁴⁶

⁴¹ It is not unknown for vendors to use the less purchaser-friendly conditions of sale than those used in private treaty sales, presumably on the basis that, at supposedly “knock-down” auction prices, potential bidders will be less fussy about making the normal property enquiries and more content to undergo some risk in effecting their purchase: see, B. Thornell and G. Murphy, ‘The Hammer Goes Down’ (1994) 91 (17) Law Society Gazette 19. It is noteworthy, however, that legal and estate agents’ professions have produced a Code of Practice, (RICS, Real Estate Auction Group), which has made some inroads into removing the potential for abuse by the vendor of the purchaser’s position at auction. This Code specifically seeks to “strike a balance between the contractual needs of the seller and the buyer whilst recognising that the seller will wish to determine the principal terms under which he/she wishes to sell”.

⁴² Occasionally, the standard form of contract for land auctions incorporates a provision allowing the purchaser to make his local searches after the auction and rescind if the certificate of search discloses adverse entries which have not been revealed as special conditions in the contract. It seems that there is no reason why a survey of the property commissioned by the vendor should not be open for inspection, nor office copy entries of the Land Register.

⁴³ By analogy, the following collateral contract cases may be of relevance here: *Couchman v Hill* [1947] KB 554 and *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch. 129.

⁴⁴ These conditions govern the relationship between the seller and the buyer and are drawn up by the RICS in conjunction with the legal professions as part of their Common Auction Conditions. Again, these may be supplemented by any special conditions agreed between the parties.

⁴⁵ Although the 1858 Act has been repealed, the repealing Act has preserved the jurisdiction: see, ss.3 and 5 of the Statute Law Revision Act 1883.

⁴⁶ Section 40(1) of the Law of Property Act 1925 provides that: “no action may be brought upon any contract for the sale of other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged or by some person thereunto by him lawfully authorised”.

Following the recommendations of the Law Commission in 1987,⁴⁷ s.40 was (in turn) repealed and replaced by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, which now governs contracts for the sale of land made after 27 September 1989.

For land sold at private auction, the requirement of a written agreement, signed by both parties in compliance with s.2(1), applies in the same way as it does for other standard land sales by private treaty.⁴⁸ Significantly, however, s.2(5)(b) of the 1989 Act expressly exempts contracts for the sale of land made in the course of a *public* auction from the formality of writing. In this connection, the Law Commission, in reference to the desirability of providing a statutory exception for public auction sales, stated:⁴⁹

We appreciate that the effect of our recommendation is that it will no longer be necessary for any written agreement to come into being. However, at present the [auctioneer's] memorandum can come into existence and may be signed without actually involving the parties themselves. It is thus not a formality which necessarily serves the function of warning people what they are doing or making sure they understand the importance of the contract. There is little doubt that in the vast majority of cases the terms of the contract will continue to be put into writing, and if they were not, the courts would readily decide any dispute as to terms as they do now with other oral contracts. However, we propose confining this exception to public auctions since other forms of auction would still seem to call for the protective functions of formalities.

It will be observed that, in one breath, the Commission abolishes the requirement of written formality where the sale is made in the course of a public auction, yet at the same time retains the requirement of a signed written contract for sales of land at private auction. In the writers' view, it is hard to justify this distinction. Indeed, in one sense, it might be said that the demand for greater protection lies in the context of land sales at public auction on the grounds that such auction sales are undoubtedly more common.

Prior to the enactment of s.40 of the 1925 Act, a contract made in the course of a public auction was made on the fall of the hammer with the auctioneer having authority to sign a memorandum on behalf of both the vendor and purchaser.⁵⁰ Under the provisions of s.40, therefore, a contract for the sale of land at auction was in reality always enforceable. Under the 1989 Act, however, public auction sales are excluded from the application of s.2 so that there is a binding contract on the fall of the hammer despite the absence of any writing at all.⁵¹

The logic of distinguishing between a private and public sale at auction is hard to understand. The need for evidential certainty in terms of the price paid, the identity of the property and names of the parties must surely apply to both types of transaction. Moreover, the suggestion that the courts would "readily decide any dispute as to terms "as they do now with other oral contracts" is open to serious doubt. As Harvey and Meisel observe in their book, *Auctions Law and Practice*,⁵² the suggestion "underestimates the difficulties which would arise were the terms of a contract for the sale of land by public auction *not* put into writing". As the authors also point out, the effect of abolishing any requirement of writing in the case of land sales by public auction is to

⁴⁷ See, Law Commission, *Transfers of Land: Formalities for Contracts for Sale, etc. of Land*, (Law Com No. 164, 1987).

⁴⁸ In this scenario, the auctioneer can argue that he has *implied* authority to sign the written agreement on behalf of both vendor and purchaser. It is noteworthy, however, that under s. 2 of the 1989 Act, solicitors and estate agents require an *express* authority from their clients before they can sign a written contract for the sale of land: see, *Smith v Webster* (1876) 3 Ch D 49; *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694; *Wragg v Lovett* [1948] 2 All ER 968 and *Kean v Mear* [1920] 2 Ch 574.

⁴⁹ *Ibid* para. 4.11.

⁵⁰ See, *Beer v London Paris Hotel Co* (1875) LR 20 Eq 412 and *Sims v Landray* [1894] 2 Ch 318.

⁵¹ See, Megarry and Wade, *The Law of Real Property*, (7th edn, Thomson Sweet and Maxwell 2008) para 15–022.

⁵² Harvey and Meisel (n3) para 9.12.

render such sales complete simply by the fall of the hammer as with chattels. However, the need for some form of written statement of terms in such cases is beyond doubt, not only to safeguard the interests of the buyer but also to protect the seller. Given that the Law Commission clearly envisaged that there would always be such a document in practice, it is all the more surprising that the requirement of writing was not put on a statutory footing. As mentioned earlier, once a bid for the land has been accepted by the auctioneer, the successful bidder is treated normally as having entered into a collateral contract with the vendor to effect a formal contract in writing to buy the property. The mechanism of a collateral contract is an important and necessary mechanism so as to bind the parties prior to a formal contract of sale which, it is submitted, has just as much relevance to public as well as private auction sales.

In the writers' view, therefore, no distinction should be made between the two types of sale so that the written requirements of s.2 should apply to both types of transaction.

ONLINE AUCTIONS

An online auction is an auction which is held over the internet.⁵³ Online auctions come in many different formats, but the most popular are the so-called "ascending English" and "Dutch" auctions. In an English auction, the initial price starts low and rises up due to competition amongst the bidders, whereas in a Dutch auction the price begins high and is systematically lowered until a buyer accepts the price.

Transactions conducted on eBay, for example, represent the traditional ascending English model of auction sale. Both sellers and buyers must register themselves on eBay so as to be bound by the eBay terms and conditions. This acknowledgment is a mandatory requirement for participation in the auction and, in doing so, both seller and buyer declare their intention to contract subject to these terms not merely in relation to eBay, but also amongst themselves *inter se*.⁵⁴ To this extent, therefore, the parties' respective contractual relationships do not differ fundamentally from the "taking part" contract and contract between auction house and bidder to be found in a traditional auction sale.

As with a traditional auction, an item is listed for sale⁵⁵ with a reserve price and prospective purchasers make their respective bids. The item listed for sale is then sold to the highest bidder provided the reserve price is met. Unlike a traditional auction, however, eBay as an "auctioneer" does not physically deal with the bids, nor does it receive the purchase money or take physical possession of the relevant item – instead, it merely provides the electronic forum for the transaction, charging a fee to list the items, and oversees bidding on behalf of the sellers. There is also the crucial difference of timing. Most online auctions are conducted over a certain period of time which helps the bidder who does not have to be constantly online to participate in the auction. There is also the obvious distinction that online auctions use the internet to conduct a

⁵³ We are not concerned here with a traditional auctioneer using the internet as an additional sales channel in a physical (or virtual) auction room.

⁵⁴ Users agree to the eBay terms and conditions by clicking on an "I accept" button located at the end of the User Agreement.

⁵⁵ The eBay's User Agreement makes clear that eBay itself does not offer to sell anything and that the offer for sale is made by the registered user who places the items for sale. The Agreement also states that: "eBay is not an auctioneer. Although commonly referred to as an online auction web site, it is important to realise that we are not a traditional auctioneer. Instead the site acts as a venue, which allows registered users to offer, sell, and buy just about anything which is legal, at any time, from anywhere, in a variety of price formats including fixed price and auction-style. We do not review listing provided by users, we never possess the items offered through the site and we are not involved in transactions between buyer and sellers." On this basis, it is difficult to see how eBay can be said to be acting as agent for either the seller or buyer or that it has authority to execute a contract on behalf of the parties.

virtual scenario where the parties never meet and the purchaser has no opportunity to examine the items personally.

Despite these fundamental differences, the eBay sale itself, in terms of offer and acceptance, does not differ significantly from the traditional auction sale transaction. In this connection, the New South Wales Supreme Court in *Peter Smythe v Vincent Thomas*⁵⁶ has ruled that the fundamental principles of offer and acceptance in contract law apply equally to contracts formed online. In this case, a 1946 World War II plane was put up for sale on eBay with an auction period of 10 days and a reserve price of \$150,000. At the end of the auction period, eBay informed both the buyer and seller that the seller had “won” the aircraft. There were no other bidders. The Court held that an online auction was capable of creating a binding contract between buyer and seller in the same way as a traditional auction – “the auctioneer is the agent of the seller and the agent can accept a bid on behalf of the seller which is what occurs in an eBay auction”.⁵⁷ Significantly, Clause 5.2 of the eBay Rules stated that:

If you receive at least one bid at or above your stated minimum price (or in the case of reserve auctions, at or above the reserve price), you are to be obligated to complete the transaction to the highest bidder upon the item's completion”

This demonstrated that an online auction was completed when a nominated deadline had passed. In the words of Rein AJ:⁵⁸

In circumstances where both the buyer and seller agree to accept the terms and conditions of eBay, I see no difficulty in treating the parties as having accepted that the online auction will have features that are both similar and different to auctions conducted in other forums . . . The parties have agreed to allow eBay, or its computer, to automatically close the bidding at a fixed time and have accepted that eBay will have no personal liability to either buyer or seller. The automatic close of bidding at a fixed time and the generation of an eBay advice headed ‘won’ appear to have been accepted by the parties to an eBay auction as the equivalent of the fall of the hammer.⁵⁹

This resembles, in many ways, the old method of holding an auction “by inch of candle” where, after the conditions of sale had been read out, a piece of candle was lighted and participants commenced bidding against one another. The last bid before the candle burnt out won the day. In this form of auction, the going out of the candle corresponded to the fall of the hammer in a modern auction. Similarly, in the context of an eBay style of auction, once the reserve price has been reached at the fixed deadline, the highest bidder will “win” the item and will be deemed to be the successful purchaser. In the *Smythe* case, in particular, even though certain important elements of the transaction (i.e., regarding payment terms) had not been concluded, the Court held that the parties had entered into a binding contract of sale according to the eBay terms and conditions⁶⁰ once the designated time for bidding for the item had elapsed. The case is, therefore, significant in so far as it confirms, so far as the applicable law in Australia is concerned, that an eBay sale constitutes a species of auction⁶¹ and, therefore, a sale of goods. If

⁵⁶ [2007] NSWSC 844.

⁵⁷ *Ibid* at [77] (Rein J).

⁵⁸ *Ibid* [35].

⁵⁹ Rein AJ noted that s. 60(2) of the Sale of Goods Act 1923 (equivalent to s. 57(1) of the Sale of Goods Act 1979 in the UK), contemplated modes of completion other than the fall of the hammer. The relevant sub-section makes provision for the sale to be complete by the fall of the hammer or “any customary manner”, which in the context of an online auction must surely include a set time elapsing without the intervention of a live auctioneer.

⁶⁰ It is to be noted that the claimant did not seek to enforce the agreement between eBay and the seller.

⁶¹ In *Chelmsford Auctions Ltd v Poole* [1973] QB 542, Lord Denning MR identified three contracts on a sale by auction: (1) the sale contract between the owner and the highest bidder; (2) the contract between the owner and the auctioneer; and

accepted by the English courts, this will inevitably have important consequences in terms of consumer protection⁶² for both buyer and seller.

Apart from the online auction typified by the eBay model, it is possible for traditional auctioneers to use the internet as an additional sales channel and sell via a virtual auction room rather than a physical one, or use both in order to receive bids from potential purchasers. Technologies such as video links, broadband and Skype make this possible. As with telephone bids, however, it is submitted that virtual bids placed during a physical and/or virtual auction do not alter the essential legal framework of the auction sale. Regardless of the technology used to receive bids, the live auctioneer retains his role as agent for the parties and, therefore, remains a traditional auctioneer. For example, Gilden's Arts in London, specialising in international art, conducts live auctions where bidders can also participate online. Another example is the-saleroom.com, which is Europe's leading portal for fine art and antiques auctions. Visitors to the site can search and browse catalogues and place bids over the internet in real time, with live audio and video feeds communicating the auction room atmosphere. The site is wholly owned and operated by ATG Media – a global pioneer of auction portals and live and timed online auctions.

In both examples, the live auction takes place in a real physical auction room and registered⁶³ bidders can listen and see the items being put up for sale. Online bids are placed in real time just as bids placed in the physical room. All bids are treated in the same way by the live auctioneer. The contractual model in these type of auctions is, therefore, no different from the one discussed earlier in relation to traditional auction sales.

CONCLUSION

The complexity of auction sales throws up a variety of different contractual scenarios, all of which have a valuable role to play in protecting the interests of both buyer and seller. The so-called "taking part contract" between bidders *inter se* ensures that all the participants at the auction play the bidding game by the auction rules. A breach of these rules lays an individual bidder open to a claim in damages against a fellow bidder for the lost chance of bidding for a particular lot or, alternatively, damages representing his pre-contract expenditure. The contract which exists between the auction house and each bidder also safeguards the economic interests of each bidder. Thus, if the auction house fails to entertain a genuine bid and awards the lot in question to a rival bidder for a smaller bid, or simply ignores a bidder and sells the lot for the same price to another, the disappointed bidder will have a claim in damages for the lost profit (if any) which could have been earned if his bid had been properly accepted. Alternatively, the disappointed bidder may claim reliance loss damages.

(3) the contract between the auctioneer and highest bidder. It is submitted that this tripartite contractual relationship also exists in online eBay auctions. The seller contracts with eBay for the provision of the online site for hosting the auction. The buyer also has a contract with eBay for the provision of the site to access and take part in the live auctions. There is also sale contract itself between the seller and highest bidder. The lack of any agency, however, between the seller and eBay is the main distinguishing feature notwithstanding that eBay charges a fee from the seller as well as a commission on a successful sale.

⁶² The Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 already apply to eBay online auction sales in so far as they fall within the definition of "distance contracts" which are made under an organised scheme for selling or supplying without both the trader and the consumer being physically present simultaneously and made using only means of distance communication. Arguably, the Sale of Goods Act 1979 also applies to internet auctions. The position is less clear regarding the application of s. 12(2) of the Unfair Contract Terms Act 1977 and s. 2(5) of the Consumer Rights Act 2015. The word "auction" is not defined in these Acts.

⁶³ Telephone and online bidders will be required to register in much the same way as physical bidders at the auction.

In terms of the actual sale contract between bidder and seller, a distinction is drawn, as we have seen, between those auctions where there is a “sale *with* reserve” and those where there is a “sale *without* reserve”. In the case of auctions held *with* a reserve price, the auctioneer, in inviting bids for a particular lot, makes an invitation to treat to the various bidders. The offer is then made by the relevant bidder. Where, on the other hand, the auction sale is held *without* a reserve price, the auctioneer makes an offer to sell the lot and that offer is accepted by the bidder who makes the highest bid at the auction. If the auctioneer withdraws the lot without justification, he is liable on a *separate* (or collateral) contract between him and the highest bidder that the sale will be without reserve. As a matter of policy, it seems right to hold the auctioneer liable under this separate contract. If he were not liable, the fact that the sale was without reserve (which may induce persons to bid) would have no meaning and not benefit bidders at all. In other words, absent a collateral contract, there would be no legal effect in advertising a sale as being without reserve since the sale is not complete until the fall of the hammer.

Selling land at public auction raises different issues. Once a bid for the land has been accepted by the auctioneer, by the fall of the hammer, the successful bidder will be treated as having entered into a binding contract with the vendor. This contract, however, represents, in effect, a collateral contract with the vendor to buy the land in question – an important and necessary mechanism, it is submitted, which is employed in order to define the parties’ legal relationship prior to the execution of a formal written contract of sale. So far as the sale contract itself is concerned, a distinction is drawn, as we have seen, between private and public auction sales in so far as s.2(5)(a) of the 1989 Act exempts public auction sales of land from the formality of writing. Although the Law Commission, in its 1987 Report, suggested that this caused no practical difficulties, it also acknowledged that, in the vast majority of cases, the terms of the parties’ sale agreement will be put into writing. In the writers’ view, therefore, the “protective functions of formalities”⁶⁴ should apply to both private and public auction sales of land, not least in order to avoid the possibility of an evidential vacuum in such sales, but also to better reflect auction practice.

So far as online auction sales are concerned, the contractual model deployed in traditional (face to face) auctions does not, in the writers’ view, differ significantly from the typical eBay type of ascending auction available on the internet. Although there is no “live auctioneer”, such online auctions provide a virtual platform whereby sellers and buyers may be brought together directly in order to contract. Apart, therefore, from the lack of any agency between seller and “auctioneer”, the eBay model has all the key hallmarks of a traditional (face to face) auction in so far as the necessary elements of public competition and sale to the highest bidder are present.

⁶⁴ See, Law Commission (n 47) para. 4.11.

THE LEGAL PROSPECTIVE FORCE OF CONSTITUTIONAL COURTS DECISIONS: REFLECTIONS FROM THE CONSTITUTIONAL JURISPRUDENCE OF KOSOVO AND BEYOND

VISAR MORINA*

ABSTRACT

One of the canons of centralised systems of constitutional review is the legally-binding nature of constitutional court decisions. This rule has clearly been provided in the Kosovo Constitution, which gives Constitutional Court decisions an incontestable degree of legally-binding force. But behind this constitutional stance, lies an intricate complexity which involves many open questions that this paper seeks to address. Questions relating to the precedential nature of Court decisions and, in particular, whether it is entitled to digress from its own previous rulings show the complexity of issues pertaining to judicial interpretation. The article initially examines the basic features of constitutional review in Kosovo and analyses the binding nature of the court decisions in the comparative context. The article subsequently explores how the prospective force of constitutional court decisions is limited by the type of constitutional review proceedings and how the precedential effect of constitutional court decisions is received in continental legal systems. The article also sheds light on the difficulty in distinguishing between the *decidendi* and *dicta* as far as the legally-binding nature of constitutional courts decisions. The author argues that is essential for centralized constitutional review systems that lower courts respect the precedential value of constitutional court decisions in order to increase judicial efficiency and to amplify the legal prospective-force of constitutional court decisions as a tool for ensuring greater constitutional stability and interpretational coherence in the constitutional democracy.

INTRODUCTION

Constitutions often state that decisions of constitutional courts are legally binding for everyone. However, a number of questions lurk behind the general proposition of their binding effect, which this paper seeks to examine from a doctrinal, comparative and jurisprudential perspective. Sometimes it is unclear to what extent constitutional court decisions are legally binding prospectively, and to what degree such decisions bind the legislature or judiciary in future undertakings. This in parallel goes with the question as to whether constitutional courts decisions attain the status of a precedent in a civil law system by directing institutional behaviours in the centralized systems of constitutional review. This article analyses the nature of the legally-binding effects of constitutional court decisions and examines their prospective legal force. The paper focuses on the case of the Kosovo Constitutional Court (hereinafter as “KCC”), whose decisions over the past few years not only have had a profound impact upon the functioning of state institutions but have occasionally revealed ambiguity and constitutional uncertainty regarding the margins of legal abidingness. The paper initially outlines the characteristics of constitutional review in Kosovo and continues with a comparative analysis, particularly focussed on Germany, regarding the binding nature of constitutional court decisions. The paper then seeks to analyse the parameters of the prospective force of

*Lecturer in Law, University of Prishtina, Kosovo.

these decisions, and whether and to what extent such courts are entitled to deviate from their prior rulings. Finally, the paper discusses a controversial issue in regards to which parts of a judgment are considered legally binding in a constitutional jurisprudence. By supporting the conception of the prospective force of constitutional court decisions, I argue that in centralized systems of constitutional review it is important that lower courts and other public authorities follow decisions of constitutional courts in the form of legally-binding precedent when deciding subsequent cases with similar issues or facts. Although it is generally uncommon in civil law systems for the courts to be bound by judicial precedents due to the traditional accountability of judges to the law, it will be argued that the precedential nature of constitutional court decisions increases the degree of legal predictability and stability and ensures the so-called constant jurisprudence in the process of resolution of judicial cases.

The principal features of the constitutional review in Kosovo: an overview

The basics of constitutional review in post-status Kosovo have been laid down by the Kosovo Constitution, which is the most recent national constitution to have been adopted in Europe.¹ What is striking to observe is that the Constitution provides for a centralised-type of constitutional review where the powers of constitutional review have been allocated to a nine-member Constitutional Court that operates outside the court system in Kosovo.² The competences of the Court are broad but in many ways similar to other European constitutional courts. Key among them are the Court's powers to nullify parliamentary enacted legislation when declared incompatible with the Constitution and the power to assess whether a municipal statute, a proposed referendum or a draft constitutional amendment is compatible with the Constitution.³ Individuals are also entitled to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution. Such alleged violations only become ripe for constitutional review after exhaustion of all legal remedies provided by law.⁴ Not surprisingly, the largest number of constitutional referrals to the Court are filed by individuals. According to last year annual report of the KCC, 161 out of 187 total referrals or (86.1%) were filed by individuals.⁵ This speaks of the growing importance of this mechanism regarding the protection of constitutional rights.

The legally binding character of constitutional court decisions

Where constitutional tribunals exist in the continental European landscape, decisions of these courts are generally legally binding upon all public institutions and private persons.⁶ In the Federal Republic of Germany, decisions of the German Federal Constitutional Court "are binding upon federal and constitutional bodies as well as

¹ The Kosovo Constitution has entered into force on 15 June 2008 a few months after the enactment of the Kosovo Declaration of independence on 17 February 2008. The Constitution is available at the Official Gazette of the Republic of Kosovo at <http://gazetazrytare.rks-gov.net>.

² Nicolas Mansfield, 'Creating a Constitutional Court: Lessons from Kosovo' [2013] East-West Management Institute Occasional Paper Series; Joseph Marko, 'The new Kosovo constitution in a regional comparative perspective' [2008] 33 Rev. Cent. & E. Eur. L. 437; Dren Doli and Fisnik Korenica, 'Calling Kosovo's Constitution: A Legal Review' [2010] 22 Denning LJ 51.

³ Constitution of Kosovo (n 1) art 113.

⁴ *Ibid* (n 1) art 113.7.

⁵ See the 2012 annual report of the Kosovo Constitutional Court, which is available at <<http://gjk-ks.org/repository/docs/RAPORTI%20VJETOR%202012.pdf>> accessed 18 December 2014.

⁶ See B. Somody, *Constitutional Law in Hungary* (Kluwer Law International, 2010); L. Sólyom & G. Brunner, eds. *Constitutional judiciary in a new democracy: The Hungarian constitutional court* (University of Michigan Press, 2000); W. Sadurski, *Rights before courts: a study of constitutional courts in postcommunist states of Central and Eastern Europe* (Springer, 2005).

upon all courts and authorities”.⁷ Likewise in Croatia and Slovenia, decisions of those respective Constitutional Courts are considered legally binding for everyone.⁸ The Kosovo Constitution also follows the concept of the legally binding effect of such Court decisions. Article 116 of the Constitution provides that “decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo”.⁹ But while the legally binding nature of the KCC decisions has never been questioned, the wording contained in Article 116 of the Kosovo Constitution does not particularly address whether decisions of the KCC will have a precedential effect. As will be discussed later, the judicial developments in Kosovo have shown that the KCC decisions are merely observed based on the hierarchical ordering and the constitutional requirement of the binding force of the KCC decisions but not as legally-binding precedents. The respect of constitutional court’s decisions in the centralized systems of constitutional review, as academic commentators argue, can be effective only if ordinary courts generally respect the constitutional court’s rulings in the form of precedent, a practice that would prevent the constitutional courts by repeatedly deciding the issues that have been decided.¹⁰ The legally binding character of constitutional court decisions should not be generally understood in an unconditional sense and in the analogous manner as the legally-binding nature of statutes but as structured judicial reasoning process where the binding force of the constitutional court decisions is taken into account as a source of legal argumentation by the ordinary judges.¹¹ It is only upon this establishment that the precedential-effect of constitutional court decisions can gain ground in legal systems that are strongly statute-oriented such the case of Kosovo. One of the effective mechanisms that ensures communication between ordinary courts and the KCC in Kosovo, regarding problems of constitutionality and the binding force of constitutional courts decisions is the incidental referral. Through this mechanism ordinary courts may refer constitutional questions directly to the Court in cases where the outcome of the case hinges upon whether an operative law in the case complies with the Constitution.¹² The referring court should explain in detail why it considers the relevant legal provision to be in contradiction with the Constitution and how the decision in the case at bar depends upon a Court ruling regarding the constitutional validity of the law. The decision of the Court will be final and will be considered to have a binding force not only for the referring court but for the entire ordinary courts in Kosovo when a similar issues is addressed. The plea for unconstitutionality raised by the ordinary courts does not only increase communication between lower courts and the KCC but will also increase efficiency in the judicial proceedings since it will exempt other courts from making referrals in the cases where the KCC has already issued a legally-binding decision that must serve as a precedent.¹³

⁷ Art. 31 of the Federal Constitutional Court Act.

⁸ See art. 31 of the Law on the Constitutional Court of Croatia (No. 49/02 of May 3, 2002), and Art. 1 of the Law on the Constitutional Court of Slovenia (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text and 109/12).

⁹ The term ‘decisions’ in the context of Article 116 is presumed to mean judgments of the Court wherein the merits of the case are decided pursuant to Article 56 of the Rules of Procedure of the Constitutional Court of Kosovo. Though the Court may issue other *resolutions* in response to lower court incidental referrals and decisions regarding requests for interim measures, administrative matters, and other such orders that it deems appropriate, this paper will focus only on decisions that have addressed the merits of a case.

¹⁰ Kühn, Zdenek, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (BRILL, 2011) 233.

¹¹ *Ibid* 234.

¹² Constitution of Kosovo (n 1) art 113, para. 8.

¹³ See more on incidental referral Sarah Wright Sheive, ‘Central and Eastern European constitutional courts and the anti-majoritarian objection to judicial review’ [1994] 26 Law & Pol’y Int’l Bus. 1201; Bojan Bugaric, ‘Courts as Policy-Makers: Lessons from Transition’ [2001] 42 Harv. Int’l LJ. 247. But in sharp contrast to the plethora of individual constitutional

The Res Judicata principle and legal implications of erga omnes decisions

The prospective force of constitutional court decisions in general, as will be shown, depends to a large extent on several factors, such as the type of constitutional review proceeding, the nature of the constitutional dispute under review, and the type of parties petitioning for constitutional review.¹⁴ According to a report of the Venice Commission, which is a consultative body of the Council of Europe on constitutional issues, the legal effects of constitutional court decisions can vary but in general, one can distinguish between three types of constitutional court decisions: decisions producing effects of a final judgment on the merits (*res judicata*), decisions with legal effects (*erga omnes*), and decisions with effects equal to the force of law.¹⁵ *Res judicata* is the principle that a matter may not, generally, be re-litigated once it has been judged on the merits.¹⁶ Although not explicitly stipulated in constitutions or constitutional courts' acts this principle means that once a constitutional court concludes a case and issues a final judgment both parties to the case are prohibited from bringing the same matter before the constitutional court. As the former judge at the German Constitutional Court Steinberger has argued in his study about effects of constitutional court judgments, the effect of the binding force of such decisions contains a preclusive element, which prevents constitutional courts from addressing for the second time matters that have already been reviewed and decided by a constitutional court.¹⁷ The Law on the Constitutional Court of Kosovo (hereinafter "the Law on the KCC") does not specifically articulate the *res judicata* principle but the Court's Rules of Procedure provide that the Court is entitled to reject any referral on grounds of inadmissibility if the Court has already issued a decision on the matter concerned.¹⁸

A much broader scope of the legally binding effect of constitutional court decisions exists in so-called *erga omnes* constitutional court decisions. This is a situation when a court judgment binds all actors in a legal system "even those not party to the suit".¹⁹ Typically, this is a case when a constitutional court declares a law to be fully or partially unconstitutional, and the legal effects of a court judgment not only apply to the case at bar, but have a much broader legal effect on all other existing or future cases. In constitutional jurisprudence this usually occurs when constitutional courts render decisions on abstract review procedures, in particular when a constitutional court issues constitutional interpretations to resolve points of constitutional ambiguity. When such decisions establish a *ratio decidendi*²⁰ they will "bind all other courts or public authorities when deciding on different matters where the interpretation of this

complaints, the Court has received a few cases of incidental referral since it began to function. There may be several reasons why ordinary courts have not approached the Court with such cases. One possible factor could be the lack of familiarity with the use of this mechanism when confronted with questions regarding the constitutional compatibility of otherwise controlling law. Second, most judges are facing a large number of unresolved cases and a growing backlog of cases, which leaves little time for them to concentrate on verifying the compliance of laws with the constitution. Third, there is also a sort of less inducement among advocates and legal specialists to address questions of compatibility of laws with the constitution before the judge in the course of concrete judicial proceedings.

¹⁴ See Helmut Steinberger, 'Decisions of the constitutional court and their effects' in the Venice Commission (ed), *Role of the Constitutional Court in the Consolidation of the Rule of Law* (Science and technique of democracy No.10, 1994).

¹⁵ *Ibid* 74.

¹⁶ See the definition provided in the online dictionary regarding the meaning of precedent at <http://www.merriam-webster.com/dictionary/res%20judicata>.

¹⁷ Steinberger (n 14).

¹⁸ Rules of Procedure, art. 36.

¹⁹ Donald Kommers et. al, *American Constitutional Law: Essays, Cases, and Comparative Notes* (Rowman & Littlefield, 2004) 26.

²⁰ *Ratio decidendi* means "the reason for deciding". For a more elaboration of this term see B. Garner, *A dictionary of modern legal usage*. (Oxford University Press, 2001) 735.

constitutional provision is relevant”.²¹ The *erga omnes* effect of the constitutional court decision is provided in many countries, including Germany, Austria and Italy.²² The Hungarian Constitutional Court is also competent to render *erga omnes* decisions in the so-called negative legislation process when parliamentary legislation is annulled as a result of incompatibility with constitution norms.²³ In this case the decisions of the constitutional court would be considered binding for everyone. There have been a few cases in the jurisprudence of the KCC whose decisions have had *erga omnes* legal effects. These are the cases when the KCC declares a law unconstitutional and the judgment develops a binding force for everyone. One of these cases is the Immunity Case (2011).²⁴ As criminal investigations were about to affect high state officials in Kosovo, on 20 July 2011, an interpretative decision was sought from the Court by the Government of Kosovo to determine the scope of the immunity guarantees that the Constitution provided for different state actors within governmental bodies of Kosovo namely – the deputies of the Assembly, the President of the Republic, and various members of the Government.²⁵ More specifically, the Court sought to clarify whether the afore-mentioned high state officials are considered immune from prosecution, civil lawsuit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities.²⁶ In its interpretative decision, the Court argued that “the deputies of the Assembly, the President of the Republic and the members of the Government enjoy functional immunity” but only for actions taken or decisions made within the scope of their respective responsibility, and are therefore non-liaible in judicial proceedings of any nature over the opinions expressed, votes cast or decisions taken within the scope of their responsibility.²⁷ This interpretative decision of the KCC carries the force of an *erga omnes* decision, whose legal effects extend to all similar and future cases. What remains unclear in the Kosovo constitutional law discourse is whether the KCC decision, declaring a law unconstitutional, obliges the legislature, based on the reasoning of the decision, not to adopt any law with the same content again – the so-called prohibition of repeated adoption of an unconstitutional law. This raises a question of whether constitutional court holdings extend to future legislative acts possessing identical or nearly identical content. Such a situation emerged in Germany after Parliament adopted a law identical to a law which the German Constitutional Court (hereinafter as GCC) had declared to be invalid due to its noncompliance with the Constitution (Grundgesetz). The GCC addressed this matter in three decisions. In 1951, it decided, inter alia, that the GCC is obliged to declare a legal provision invalid if such provision is in contradiction with the Basic Law.²⁸ This decision is binding for all federal constitutional authorities pursuant to article 31.1 of the Federal Law on German Constitutional Court (hereinafter as FLCC), because a decision of GCC repealing a law, not only has the force of law, but according to Article 31.1 of the FLCC, it obliges all federal constitutional authorities based on the reasoning of the decision, not to adopt any federal law with the same content again.²⁹ However, in 1953, the First Chamber of

²¹ Steinberger (n 14) 76.

²² Kommers (n 19) 26.

²³ Marta Dezso, *Constitutional Law in Hungary* (Walters Kluwer, 2010) 186.

²⁴ The Government of Kosovo concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo [2011] KO. 98/11 e.g. 280 (CC).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ BvervGE 14 (1951), the so-called Southwest State case (Südweststaat-Streit).

²⁹ Jürgen Schwabe, *Selected decisions of Federal Constitutional Court* (Konrad Adenauer Stiftung, 2010).

the GCC altered its position regarding the prohibition of repeated adoption of a law (declared previously as unconstitutional). The GCC stated that constitutional decisions declaring laws to be invalid are merely *res judicata* decisions, and thus do not prevent the legislature from adopting new laws with the same or similar content than laws declared as invalid.³⁰ In the reasoning of its decisions, the GCC explained, *inter alia*, that “Article 20 of the Basic Law (principle of the rule of law) is binding for the legislative branch only in regard to the constitutional order, but not in regard to the ordinary law” and the legislature cannot be deprived from its legislative discretion in taking its legislative responsibility to adopt a new law with the same content, if the parliament considers it appropriate.³¹ A similar problem has also been encountered in Kosovo insofar as prohibition of repeated adoption of a law is concerned. In the Ombudsperson vs. Assembly of Kosovo case (2011), the KCC addressed the Assembly’s adoption on 4 June 2010 of the Law on Rights and Responsibilities of the Deputy (LRRD).³² The case was heard in response to an Ombudsperson Institution request³³ for the Court to assess *inter alia* the constitutionality of certain articles of the LRRD, which provided for supplementary pensions of the deputies of the Assembly. The Ombudsperson claimed that the contested articles constituted a violation of the Constitution arguing that it enables “deputies of Kosovo Assembly to realize pensions that are far more favorable than any other pension benefit for the other citizens, and that they are inconsistent with constitutional principles of equality, rule of law, non-discrimination and social justice”.³⁴ The KCC declared the appeal admissible and declared the contested articles unconstitutional. In its decision the KCC stated boldly that its decision does not prohibit the Assembly from passing a law on pensions “... as long as the Assembly considers the requirements of the Constitution in enacting such legislation”, and presumably the judgment and the opinion of the KCC on this matter.³⁵ In terms of impact, this decision constituted a clear warning that the Court will not allow the Kosovo Assembly to re-adopt the law with the same content as that previously contested on constitutional grounds.

The precedential nature of constitutional court decisions

In this section of the article I will discuss the precedential effect of constitutional court decisions in Kosovo and will explain the importance of a precedent as a stabilizer in a continental law system. It is important to note that the Kosovo legal system is part of the continental law family of systems and is similar to the German model that is “strongly statute oriented, in that the binding force of a precedent is thought to be derived from a valid norm of either statutory or customary origin”.³⁶ The statutory approach is deeply etched in the Kosovo Constitution, which clearly states that the “courts shall adjudicate based on the Constitution and the law” but there is no mentioning of precedents as a

³⁰ See Anke Eilers, ‘The binding effect of the Federal Constitutional Court Decisions upon Political Institutions’, analysis prepared for the Council of Europe (Venice Commission) in the seminar organized in Albania on the effect of constitutional courts decisions.

³¹ *Ibid.*

³² *Ombudsperson of the Republic of Kosovo vs. Assembly of Kosovo* [2011] KO 119/10 (CC).

³³ Shortly after enactment of the LRRD, the Ombudsperson Institution received a joint submission from a number of Non-Governmental Organisations requesting the Ombudsperson to request Constitutional review.

³⁴ *Ombudsperson of the Republic of Kosovo* (n 32).

³⁵ *Ibid.*

³⁶ Raimo Siltala, *A theory of precedent: From analytical positivism to a post-analytical philosophy of law* (Hart Publishing, 2000). For more on the role of precedent in the decision-making process see Michael Gerhardt, ‘The role of the Precedent in Constitutional Decision-making and Theory’ 60 *Washington Law Review* 68 1991–1992; Evan H. Caminker, ‘Why must inferior courts obey superior court precedents?’ *Stanford Law Review* Vol 46 No. 4, 1994; Cooper, Charles J. ‘Stare Decisis: Precedent and Principle in Constitutional Adjudication’ *Cornell L. Rev.* 73 (1987): 401; Mitchell, Jonathan F. ‘Stare Decisis and Constitutional Text’ *Michigan Law Review* (2011): 1–68.

source of law except for the constitutional rule that “human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.³⁷ Admittedly, it can be argued that reliance on the precedents within the margins of the ordinary courts in Kosovo is an exception and can be practiced merely for purposes of argumentative persuasive force or as a “de facto influence on the lower court’s legal discretion”.³⁸ While the Kosovo Law on Courts does provide for the Supreme Court to call a General Session of all its judges in order to render decisions that promote unique application of the Laws, there is no legal provision which compels lower courts to follow the jurisprudence of the Supreme Court.³⁹ However, as shall be explained below, the over-reliance on statutory law in continental legal systems should not be over-estimated given the increasing precedential effect of constitutional court decisions. There are several arguments that support the view for the judicial reliance on the KCC decisions in the form of precedents. First, it must be stated that pursuant to Article 116, paragraph 1 of Kosovo Constitution the state authorities and individuals are constitutionally obliged to respect and enforce decisions of the KCC. This rule practically means that failure to comply with the KCC ruling would constitute a clear violation of the constitutional provisions regarding the enforcement of the KCC decisions.⁴⁰ Second, the constitutional courts in centralised-systems of constitutional review also act as actors in the creation of legal rules where the “reasoning of individual decisions can be compared with the significance of law of precedent”.⁴¹ These arguments clearly testify that in continental European law consistent referral to the decisions of the supreme courts or constitutional courts are in fact “treated as unquestionable sources of law” which each and every public or judicial authority should consider in the form of legally-binding precedents.⁴²

But to what extent have Kosovo courts considered the decisions of the KCC as legally-binding precedents in solving judicial disputes? In this connection it is possible to state that while the judicial and public authorities in Kosovo have generally demonstrated adherence to the Court’s decisions and interpretative rulings on points of constitutional ambiguity, lower courts are not yet actively citing and referring to the KCC judgments in the form of precedents in support of their rulings.⁴³ Kosovo courts have not yet incorporated precedent-based legal reasoning methodology in their judicial reasoning. An exception to this general conclusion can only be the KCC that has shown consistent reference to the rulings of the European Court of Human Rights (ECtHR), which, as shown above, is imperative by the Kosovo Constitution given the requirement of the public authorities, including courts, to interpret human rights and fundamental freedoms guaranteed by the Constitution consistent with the decisions of the ECtHR.⁴⁴ This raises the question as to why Kosovo judges appear so reliant on statutes and regulations rather than relevant legal precedents. In this regard there are a number of factors that have contributed to the judicial rejection of the precedents in Kosovo. This

³⁷ Constitution of Kosovo (n 1) art 102 para. 3.

³⁸ Siltala (n 36) 133.

³⁹ Law on Courts, 2010 art 23.

⁴⁰ Article 116 para. 1 of the Constitution provides that “decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo”.

⁴¹ Sadurski, Wojciech, *Constitutional justice, east and west: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective* (Vol. 62, Springer Science & Business Media, 2002) 242.

⁴² *Ibid.* 177.

⁴³ See case no. 61/12 on confirmation of proposed constitutional amendments submitted by the President of the Assembly of the Republic of Kosovo on 22 June 2012 by letter Nr. 04-DO-1095, dated 21.12. 2012; Decision of the Constitutional Court No. KO 98/11 regarding the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo, dated 22 Sept. 2011.

⁴⁴ Art. 53.

can be a result of the Constitution's requirement that judges rule on constitutional and legal norms but it also reflects an inherited tradition of legal positivism where cases are resolved based on the statutes and not based on judicial-precedents. This aspect, including other factors such as lack of court libraries, the shortage of legal professionals at the courts and professional legal trainings on a drafting of judgments have established a judicial tradition of a strict adherence to statutory application in judicial adjudication without giving sufficient consideration to the case-law of the Constitutional Court. To increase the judicial reliance on the decisions of the KCC, the courts in Kosovo can follow the German model of precedents where the observance of judgment of the German Federal Constitutional Court is merely undertaken in the context of evaluation "of the reasons given in support of a precedent, and not on some formally defined criteria of *stare decisis* as in the United Kingdom".⁴⁵ Similar to the German model, the courts in Kosovo can adapt a free floating model of precedent-based system where judges evaluate facts of the case before deciding whether to support the KCC precedent or not. If the facts of the case are the same with a KCC precedent-ruling, then the judges are expected to abide by such Court ruling in the form of precedent. This seems to be an acceptable method of transplanting the KCC precedents in a judicial system that is strongly shaped by a statutory application.

Departure from a previous constitutional decision

The Kosovo Constitution, like other European constitutions, remains silent when it comes to the question of whether the Constitutional Court can depart from its own rulings. What becomes implicit when reading provisions of the Kosovo Constitution is that decisions of the KCC must be executed by everyone, including the ordinary courts. A failure to implement a decision of the Court is incompatible with constitutional expectations and must be prohibited. This represents the trajectory of the judicial hierarchy between ordinary courts and the Constitutional Court. But how free is the Court to deviate from its own past decisions by holding a different constitutional interpretation of a constitutional norm? While constitutional courts in general may not be formally bound to observe their own decisions, as the Grand Chamber of the ECtHR reasoned in the *Christine v. UK* case (2002)⁴⁶ "it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases".⁴⁷ The former judge of the International Court of Justice, Hersch Lauterpacht, offers an interesting example from the perspective of the International Court of Justice (ICJ) regarding the departure of that Court from its previous rulings that may be useful for the jurisprudence of national constitutional courts. In Lauterpacht's view, "so long as the Court itself has not overruled its former pronouncement or so long as States have not, by a treaty of a general character, adopted a different formulation of the law, the ruling formally given by the Court on any question of international law must be considered as having settled, for the time being, the particular question at issue".⁴⁸ By analogy, it may be emphasised that without changes in the jurisprudence of the KCC that would warrant reconsideration of a prior opinion, and without some altering of the constitutional or statutory text of the issue concerned by Parliament, the judges of the KCC will essentially have no rational basis for a departure from the position reflected in their

⁴⁵ Siltala (n 36) 133.

⁴⁶ *Christine Goodwin v UK* application no. 28957/95 (ECtHR, 11 July 2002).

⁴⁷ H. D., O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, (Oxford University Press, 2014) 21.

⁴⁸ Sh. Mohamed, *Precedent in the World Court* (Cambridge University Press, 2007) 128.

prior judgment. While consistency in constitutional jurisprudence is never absolute, a constitutional court may decide not to stand by its previous rulings if it considers that a new constitutional interpretation is necessary in so far as a reading of a constitutional norm is concerned. Some scholars, on the other hand, argue that when it comes to the question as to what extent is one court's decision binding on itself, the court "is technically not bound by its own decisions, though in practice High Court judges will usually follow previous High Court decisions unless there are good reasons not to do so".⁴⁹

The situations when constitutional courts may depart from their rulings are multiple. They may include a situation where a court may be forced to choose between one of two prior conflicting constitutional decisions.⁵⁰ Alternatively the Court may be compelled to respond to an ECtHR ruling which renders a previous decision to be counter to ECtHR jurisprudence. In such situations, it is of course imperative for constitutional courts to depart from their own previous rulings in order to achieve harmony with ECtHR jurisprudence. It's important to mention that Kosovo is not yet a member of the Council of Europe and falls outside the jurisdiction of the ECtHR, consequently the rulings of the KCC cannot be challenged before the ECtHR. However, as mentioned above, it is advisable for the constitutional courts to follow the so-called "jurisprudence constante", which according to the civil law theory of precedent "exists when a series of decisions form a constant stream of uniform and homogenous rulings having the same reasoning".⁵¹ It is only through this judicial philosophy that KCC decisions will be given great weight by ordinary courts and "may even achieve a level of deference similar to that accorded to legislation".⁵²

Ratio decidendi vs. obiter dicta

One issue that merits further consideration is the process of discerning which parts of the constitutional judgments are considered to carry the force of law. In fact, court judgments regularly elaborate upon legal and constitutional matters that are not directly linked with the essence of the case under constitutional review. Therefore, a distinction must be made between pronouncements in a decision that address essentials of the constitution i.e. *ratio decidendi* and those "which are peripheral to the outcome of the case (i.e. *obiter dicta*, (things said in passing)).⁵³ Finch and Fafinski point out the difficulty in distinguishing between the *ratio decidendi* and *obiter dicta* (hereinafter as dicta) of a case, stating that the former, "rational of the case is the legal rule and associated reasoning that is essential to the resolution of the case. It is the conclusion that is reached by the application of the relevant legal rule to the material facts".⁵⁴ As noted because of the nature of the decisions of the Court, one finds parts that are not essential in the form of general statements that may not be constitutionally relevant. As Anke rightfully notes, it is sometimes difficult to "distinguish what forms part of the essential reasoning of a decision and what does not". Referring to the jurisprudence of the Constitutional Court in Germany she states that essential reasoning is that "which cannot be left out of the decision without the concrete conclusion of the decision being

⁴⁹ P. Harris, *An introduction to law* (Cambridge University Press, 2007).

⁵⁰ *Ibid.* 200.

⁵¹ Dunahoe, Jason Edwin, "Jurisprudence Désorientée: The Louisiana Supreme Court's Theory of Jurisprudential Valuation, *Doerr v. Mobil Oil and Louisiana Electorate of Gays and Lesbians v. State*." (2004) 64(3) Louisiana Law Review 679, 685.

⁵² *Ibid.*

⁵³ E Finch and S Fafinski, *Legal skills* (Oxford University Press, 2013) 154.

⁵⁴ *Ibid.* 156.

lost”.⁵⁵ Although identifying the *dicta* may sometimes be a difficult process, Finch and Fafinski offer some useful guidelines how to distinguish the ratio of a court judgment from the *dicta*. For example, parts of a decision that may be considered *dicta* include those statements and explanations that are broader than “necessary to reach a decision on the facts of the case”, or a statement written by the drafting judge in the case at bar which “hypothesizes about the decision that he would have reached if the facts had been different”.⁵⁶ Parts of dissenting opinions frequently contain *dicta* and may not be considered binding upon the parties.

As in other jurisdictions, it can be difficult to separate the *ratio* from the *dicta* in the jurisprudence of the KCC, in part because of vague constitutional statements rendered in its decisions. The lack of clarity in the KCC’s judgments has occasionally caused lack of certainty for both individual or institutional parties with respect to the scope of the constitutional competencies and what parts of a constitutional court judgment must be followed. The point at issue is illustrated by a seminal decision involving the KCC’s review of proposed constitutional amendments prepared by the Constitutional Commission of the Assembly.⁵⁷ On 23 March 2012, the President of the Kosovo Assembly submitted a referral to the KCC, requesting it to review whether the set of amendments would diminish any of the rights and freedoms set forth in Chapter 2 of the Constitution.⁵⁸ One such proposed constitutional amendment restricted the powers of the Acting President to execute presidential authority⁵⁹ in regards to judicial and prosecutorial appointments. It provided that ‘the Acting President of the Republic of Kosovo shall exercise all powers of the President with the exception of . . . appointment and dismissal of judges of the Republic of Kosovo, the Chief State Prosecutor and prosecutors of the Republic of Kosovo.’⁶⁰ But the KCC stated that “the proper administration of justice and confidence in the administration of justice are fundamental aspects to the enforcement of rights and freedoms, therefore, any restriction of the power of an Acting President to appoint judges and prosecutors “may have negative consequences for a normal operation of the justice sector”.⁶¹ The Court further stated that “this potential blocking of an important organ of the State could have considerable effects on the implementation of human rights and freedoms guaranteed by the Constitution, in that the inability of an Acting President to appoint new judges could obstruct court business and ultimate

⁵⁵ Eilers (n 30).

⁵⁶ Finch & Fafinski (n 53) 156. See also B. Somody (n 6); R. Mykkeltvedt, ‘Ratio Decidendi or Obiter Dicta: The Supreme Court and Modes of Precedent Transformation’ [1980] 15 Ga. L. Rev. 311.

⁵⁷ The decision of the Kosovo Constitutional Court (2012) on the review of Proposed Constitutional Amendments submitted by the Chairman of the Assembly of Kosovo, dated 23 March 2012 and 4 May 2012. The decision is available at <http://gjk-ks.org/repository/docs/Aktgjkim%20KO29_48_12_Anex%20A%20&%20B_SHQ.pdf> It should be noted that pursuant to Article 113.9 of the Constitution – the President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.

⁵⁸ The constitutional amendments were triggered by a political agreement between key political parties dated April 2011, according to which “Mrs. Atifete Jahjaga would be nominated as candidate for President of the Republic and the respective parties would give their full support for her candidacy”. Furthermore, the Agreement provided that “leaders agreed to immediately form a “Commission for Presidential Elections Reforms”, which would draft constitutional amendments and any related legislation necessary to provide for “a direct election of the President of Kosovo by the people, and that direct presidential elections in Kosovo should be held not later than six months from the day when these changes and necessary amendments of the Constitution and the legislation would enter into force”. On 22 April 2011, the Assembly set up the Committee on the Amendments of the Constitution of Kosovo, which worked on constitutional amendments derived from the political agreements of April 2011.

⁵⁹ The Constitution foresees that upon the proposals of the Kosovo Judicial Council and the Kosovo Prosecutorial Council, the President appoints and dismisses Judges pursuant to article 104 [Appointment and Removal of Judges] and Article 84 (16), appoints and dismisses the Chief Prosecutor under Article 84 (17) and appoints other prosecutors under Article 84 (18) of the Constitution.

⁶⁰ *Ibid.* para 169.

⁶¹ *Ibid.* para 170.

trigger constitutional paralysis”.⁶² The Court, therefore, concluded that the proposed amendment would diminish the rights and freedoms set forth in the Constitution and could not be the subject of approval by the Assembly. But the KCC, while elaborating on the unconstitutionality of the proposed amendment, in passing (*dicta*) reflected on whether the President is entitled, within his or her powers, to refuse to endorse the judicial or prosecutorial appointments, and stated that “there is little scope for the President, under the current terms of the Constitution, to withhold or to refuse to make the appointments or dismissals when proposals are made”.⁶³ The KCC did not render any final decision as to whether the President is entitled to refuse judicial or prosecutorial nominations, and the constitutional bodies sharing the powers of the appointment of judges and prosecutors were left without clear understanding as to whether this part of the judgment is legally binding or not. On the other hand, Kosovo legislation has given the President clear powers to refuse the proposed candidate for judge or prosecutor.⁶⁴ The Law on the Kosovo Judicial Council provides in clear terms that “if the President of Kosovo refuses to appoint or reappoint any candidate, the President shall within sixty (60) days provide written reasons for his refusal to the Council. The Council may present the refused candidate to the President one additional time together with its written justification, or the Council may propose another candidate”.⁶⁵ This KCC utterance suggesting a limited scope of presidential authority in vetoing judicial and prosecutorial appointments, sparked debate among the Kosovar legal community as to whether this part of the judgment (*dicta*) is legally binding. While it is still unclear whether or not the Kosovo President can reject a proposed candidacy on the grounds of merit, the respective *dicta* within the KCC judgment will leave the President with considerable discretion in exercising constitutional powers with regard to judicial and prosecutorial appointments. The prevalent risk is that the President can interpret this part of the KCC judgment as he/she deems appropriate, either as *ratio* or as *dicta*, and this creates a situation where presidential powers will be applied differently depending on circumstances that may arise.

CONCLUSION

The KCC began operating in the year of 2009 and since its inception its decisions have awakened a great deal of interest among the legal community primarily because of the legal consequences for the functioning of the Kosovo institutions. Even though the degree of adherence to the KCC decisions has been generally satisfactory, the courts in Kosovo, in which the concept of the constitutional review has not historically been an accepted judicial tradition, have not shown much of an interest in following the KCC decisions in the form of binding precedents on matters involving constitutional rights or freedoms. As argued in this paper, the absence for this precedent-based approach may have been influenced by many factors such as lack of legally-defined criteria for observing constitutional court rulings, and a judicial culture that is profoundly shaped by a statutory-driven approach of the judges and the socialist past. The paper also showed the complexity of constitutional decisions when it comes to the nature of the legal force of constitutional court decisions, in particular in differentiating between *erga omnes* and *inter partes* legal effects, and whether the court is entitled to digress from its own previous rulings.

⁶² *Ibid.* para 171.

⁶³ *Ibid.* para 168.

⁶⁴ Law on the Kosovo Judicial Council 2010, 03/L –223.

⁶⁵ *Ibid.*

However, as I have argued, there is a need to ensure certainty, predictability and uniformity in the developing of the law, to this end the Kosovo courts should follow the KCC judgments not only when they are parties in a constitutional dispute but also in a form of persuasive authority. Clearly, the development of this form of vertical judicial communication between the ordinary courts and the KCC would ensure greater legal stability and uniformity and a constitutional dialogue. Over time, lower court respect for the precedential value of the KCC decisions should also increase judicial efficiency as judges may avoid reviewing each case from the beginning by referring to relevant authoritative case law in the disposition of their cases. Finally, the prospective force of the KCC decisions is not merely a tool to achieve legal stability, but it may also become a force for constitutional development as the Court's dynamic interpretation of the Constitution leads to its constant renewal in line with emerging social norms.

DON'T TAKE AWAY MY BREAK-AWAY: BALANCING REGULATORY AND COMMERCIAL INTERESTS IN SPORT

SIMON BOYES*

ABSTRACT

Sports governing bodies' capacity to control their respective sports has come under growing pressure in recent years. As sport has become increasingly globalised and its commercial value has swelled exponentially new challenges to the regulatory schemes of sports governing bodies have become manifest.

Sports governing bodies may have *de facto* regulatory monopoly over their particular sport, but they have no formal *de jure* right to regulatory oversight and control. This leaves these bodies, and the sports they regulate, vulnerable to external threats to their regulatory autonomy, particularly from those who wish to exploit sport's commercial potential.

This article considers the various means by which the regulatory authority of sports governing bodies may fall subject to challenge, before moving to assess the legal approaches to such challenges. The article further reviews the protections available to sports regulators before concluding with proposals for a new approach.

INTRODUCTION

The ability of sports governing bodies to control their respective sports is one that has come under growing pressure in recent years. As sport has become increasingly globalised and the commercial value of elite sport has swelled exponentially – particularly in respect of media rights – new challenges to the regulatory capacity of sports governing bodies have become manifest.

The nature of the growth of modern sport – principally on a self-regulatory, private basis, separate from state intervention – means that sports governing bodies may have *de facto* regulatory monopoly over their particular sport, but that they have no formal *de jure* right to regulatory oversight and control. This leaves these bodies, and the sports they regulate, vulnerable to external threats to their regulatory autonomy, particularly from those who wish to exploit sport's commercial potential.

This article explains and assesses the various means by which the regulatory authority of sports governing bodies may fall subject to challenge, before moving to consider the legal approaches to such challenges and to the monopoly position held by sports bodies. The article further considers the protections available to sports regulators under a variety of intellectual property provisions before concluding with proposals for a new approach which balances demands for the regulation of sports in a manner consistent with the public interest, while adequately protecting sports governing bodies from having control of their sport – either partial or total – wrested from them.

*Senior Lecturer, Director of the Centre for Sports Law, Nottingham Law School, Nottingham Trent University.

SETTING THE SCENE: COMPETITION FOR CONTROL OF SPORTS AND EVENTS

For the most part, the organisations which regulate sports grew up organically, initially as a means of facilitating participation and competition and, latterly, as providers of more sophisticated regulatory authority and frameworks.¹ Generally speaking there has been little competition from would-be alternative regulators, with most challenges to regulatory authority coming through objections to the substance of regulation and practice by those subject to the regime. Most typically these challenges have come from athletes,² clubs³ and other stakeholders – such as competition organisers⁴ – with, usually, economic interests in the sport.

For the bulk of the modern era of sports regulation, sports governing bodies – both domestically and globally – have been able to utilise their positions of dominance to achieve universal control over their sport. The threat of exclusion from participation has usually been sufficient to deter any threat of breakaway and to maintain a regulatory monopoly in a given sport. For much of this period there has been limited threat from would-be alternative regulatory bodies largely due to the lack of any real incentive, and the risks inherent in any failure. Until relatively recently, even with the early advent of television, the economic value of sport has been insufficient to provoke many attempts at a ‘takeover’.

This is not to say that there are no examples of successful regulatory takeover or breakaways: the association football and rugby football codes are examples of early splits – predominantly based on differences as to how the sport should be played – and the existence of rugby league is owed to a schism in a once unified sport with the creation of the ‘Northern Union’ in 1913. The league/union split, however, came about as a dispute over professionalism and the payment of players; as such it can be seen as an example of players asserting their economic rights, rather than an attempt to wrest control of the game from the established authorities. In any case the football/rugby and league/union splits can be reasonably categorised as formative parts of the process of individual sports emerging from folk practice and from numerous early disparate, though similar, codified versions. There are very few examples of mainstream sports or sports regulators which have emerged outside of this period of codification and regularisation.⁵

Latterly, however, there exists a growing threat to the continuing monopolistic authority of sports governing bodies, principally driven by the substantial economic value of the media rights associated with them. By way of example, in the most recent round of television rights sales, the English Premier League was able to elicit £5.136bn for domestic rights and a further £3bn from overseas markets for the period 2016–19. Similarly, global broadcasting revenues for the Indian Premier League (IPL) cricket tournament ran to US\$1.026bn over ten years from 2008. The importance of sports media rights, in particular football, is exemplified by their description by Rupert Murdoch as the “battering ram” with which he would enter and establish BSkyB in the

¹ D Birley, *Sport and the Making of Britain* (Manchester University Press 1993) 10; R Holt, *Sport and the British: A Modern History* (Oxford Clarendon Press 1989) 30.

² *Eastham v Newcastle United Football Club Ltd* [1964] 1 Ch 413; *Case C-415/93 Union Royale des Sociétés de Football ASBL v Jean-Marc Bosman* [1995] ECR I-4192.

³ *Stevenage Borough Football Club v Football League Ltd* (1996) *The Times*, 1 August.

⁴ *Hendry v World Professional Billiards and Snooker Association* [2002] ECC 8.

⁵ A significant exception to this is the sport of Cricket, which developed a unified regulatory code and scheme much earlier than the football sports (J Hargreaves, *Sport, Power and Culture* (Polity Press 1986) 17). At the other extreme Mixed Martial Arts (MMA) and Quidditch are examples of sports more recently emerged.

pay-television market. BT Sport has pursued a vigorous strategy in acquiring sports rights in its efforts to establish itself as a serious competitor to Sky. The ferocity with which media outlets have challenged each other for such rights, both through the bidding process and through litigation, is a further indication of their importance.⁶ A parallel marker is the seriousness with which the sale of media rights to major sporting events and competitions has been treated by competition authorities, in particular the European Commission.⁷

The sums involved have acted as a driver for existing and would be stakeholders to seek a greater share of the pot. In respect of athletes this has principally been through seeking to enforce their economic and labour rights – such as through the *Bosman* litigation and the recent complaint to the European Commission by FIFPro, seeking to challenge the basis on which professional players are employed.⁸ In team sports, where professional clubs are key stakeholders, they have often sought to act together to take control – either partial or total – of the regulation of the sport as a whole, or to act to a significant degree independently of the regulator in operating their own competitions.

Challenges to the regulatory autonomy of established sports governing bodies can manifest themselves in many different ways dependent upon the nature of the sport, its organisational structures, the relative strength of the various stakeholder groups within it, and its economic attractiveness to broadcasters and other commercial concerns. These can be characterised under four broad headings.

'Hard' break-away

One means by which the supremacy of traditional sports governing bodies has been challenged is through the creation of rival organisations and or competitions. The most obvious example of this is in the world of professional boxing, where there currently exist a number of parallel 'world' federations. Boxing is perhaps slightly anomalous given that there has never been an outright global regulator, but a number of competing 'regulators' vying for position over a period of time.⁹

However, professional darts provides a good example with the creation in 1993 of the World Darts Council (WDC) as a competitor regulator to the established World Darts Federation (WDF). The 'break-away' WDC was supported by a group of professionals, including most or all of the best known and most successful, and by a television deal with Sky Sports. The dispute was ultimately settled by an agreement that the WDC would recognise the WDF as the international governing body and rename itself as the Professional Darts Council (PDC). The result has been that there exist separate groups of players and largely separate tournaments, with two distinct World Professional Darts Championship competitions.

Perhaps the most prominent example of the creation of a rival regulator or competition is that of World Series Cricket. In May 1977 World Series Cricket (WSC), a company managed by the Australian entrepreneur Kerry Packer, announced that it had secretly signed up thirty four of the world's foremost cricketers to play in a series of 'Super Tests' in Australia. Packer's decision to create a rival organisation to the traditional organisers of world cricket was borne of a decision by the Australian Cricket Board (now Cricket Australia) to award broadcasting rights for the Australia Test team's matches to the

⁶ See, for example, *Re an Agreement between the FA Premier League and BSkyB* [2000] EMLR 78.

⁷ See, for example, COMP/38.173 *The Football Association Premier League*.

⁸ FIFPro, 'FIFPro's EU competition law complaint – executive summary' (FIFPro, 15 September 2015) <<https://www.fifpro.org/attachments/article/6156/FIFPro%20Complaint%20Executive%20Summary.pdf>> accessed 30 March 2016.

⁹ At the time of writing there are no fewer than ten organisations claiming regulation of men's' professional boxing at a global level.

Australian Broadcasting Corporation (ABC), rather than Packer's commercial Channel 9 broadcasting company. This was despite Channel 9 having made a higher value bid for the rights. In July 1977 the International Cricket Council (ICC) – the world governing body of cricket – seeking to protect its monopoly control of cricket at international level, altered its rules so that players taking part or making themselves available to play in a match previously disapproved of by the ICC, after October 1 1977, would be disqualified from taking part in test cricket without the express consent of the ICC. At the same time the ICC issued a resolution specifically disapproving of any match organised by WSC. The ICC also recommended that national governing bodies take similar action in respect of their domestic game. The English Test and County Cricket Board (TCCB – now reformed as the England and Wales Cricket Board (ECB)) then resolved to alter its rules so that any player who was subject to the test match ban would also be disqualified from taking part in first class county cricket. The litigation which followed (discussed below) ultimately meant that WSC ran for only two seasons until 1979, when Packer and the ACB came to a rapprochement, with Packer and Channel 9 becoming a key partner for the ACB.

'Soft' break-away

A further means by which established regulatory regimes can be challenged is by 'soft' break-away. In such circumstances it is generally the case that a small number of leading participants – either athletes or clubs, dependent upon the nature of the sport – seek to set up a new competition which although, on the face of it, appears to be a straightforward reorganisation of existing structures, amounts to a significant reapportionment of power and resources. A prime example of this is the 'break-away' of top division clubs in English football, with the creation of the Premier League in 1992. On its face this appeared to be a replacement of the existing Division One of the Football League on a like-for-like basis. The reality is that the new configuration amounted to a 'land-grab' by the top clubs – supported by the overall regulator, the Football Association, but opposed by the traditional organiser of the league competition, the Football League – as a means of securing the bulk of the television revenues available from the newly emerged commercial, satellite broadcasters. The result was that, although the league arrangements looked broadly similar to the previous arrangements – four divisions with promotion and relegation between them – the revenues created by televising the top division were no longer shared with those below. Instead, the Football League was largely left to fend for itself. A similar position developed in Scotland, though a subsequent re-amalgamation has now occurred.

Regulatory Capture

An alternate, sometimes parallel, means by which regulators can experience challenge to their regulatory monopoly is by way of regulatory capture, where a stakeholder or group of stakeholders deploy a position of strength in order to exercise a degree of control over the regulator. As well as being a 'soft' break-away, the Premier League has been identified as holding such a position of strength over the regulator of English football, the Football Association. The Premier League has been criticised by a Parliamentary Select Committee as holding too great an influence on the governance of the sport in England, at the expense of the "National Game".¹⁰

Similarly, UEFA – European football's governing body – has within it the European Club Association (ECA). This group, representing the major European club sides, was

¹⁰ House of Commons Culture, Media and Sport Committee *Football Governance Follow-Up* (HC 2012–13, 509-I), 26.

created as part of a deal with a previously independent group of clubs known as the G14, an association of the highest profile European clubs. Under the arrangement the G14 dissolved and was effectively absorbed into UEFA. This was part of a package of measures aimed at alleviating and addressing the concerns of these clubs – resulting in a much greater degree of influence in the regulatory body.

Collaboration

Control of particular sports has also shifted by way of negotiation or collaboration, usually with media partners. Rugby League is a principle example of this, with the professional game at the highest level having been repackaged and re-branded in order to create a product attractive to television viewers. The creation of Superleague and the move to summer, rather than the traditional winter season, was predicated on an agreement with Rupert Murdoch's News Corporation. In the United Kingdom the regulator and broadcaster worked together to refashion the league competition. Though some early proposals to merge some existing club sides were met with fierce resistance by clubs and fans, the collaboration ultimately involved a smooth transition from the 'old' to the 'new'. This was in stark contrast to the position in Australia and New Zealand where a fierce battle was fought for control involving rival broadcasters and the regulator.¹¹ This led to two competitor leagues being played during the 1997 season, before a settlement was reached and a single competition embedded.

LEGAL RESPONSES TO BREAK-AWAY

The position as set out above raises serious concerns as to the sustainability of credibility of sport's regulatory structures. The capacity of regulators to effectively 'steward' their sport is undermined by the threat of challenge and of being stripped of control of some, if not all, of the sport under their control.

The importance of the stability of these regulators has been emphasised a number of times by the English courts. In *McInnes v Onslow-Fane* McGarry V-C highlighted that, "[b]odies such as the [British Boxing Board of Control] which promote a public interest by seeking to maintain high standards in a field of activity which might otherwise become degraded and corrupt ought not to be hampered in their work without good cause."¹² The importance of this stability is further emphasised by the judicial creation of a special private law supervisory jurisdiction under which courts will scrutinise the activities of sports governing bodies;¹³ this is in no small part due to judicial desire to avoid overburdening bodies and frustrating their important public interest role.

As is suggested above, many instances of attempted breakaway or to otherwise effect a shift in control result in litigation. The case of *Greig v Insole*, the facts of which are related above, is an important example of this, as it provides an indication of judicial attitudes.

In *Greig* Slade J. decided that both the ICC and TCCB had legitimate interests which they were entitled to protect. The ICC argued that it was acting reasonably in introducing rules which would effectively protect it from the competition provided by WSC. Test Match cricket provided a large proportion of the money through which the game at

¹¹ *News Limited & ors v Australian Rugby Football League Ltd & ors; Brisbane Broncos Rugby League Football Club Ltd & ors v Australian Rugby Football League Ltd & ors; Cowboys Rugby League Ltd v the Australian Rugby Football Club Ltd & ors* [1996] FCA 870.

¹² [1978] 1 WLR 1520, 1535.

¹³ *Bradley v Jockey Club* [2005] EWCA Civ 1056, [2006] ISLR, SLR-1.

lower levels was financed. Thus, the ICC argued, it was acting reasonably in aiming to prevent players from taking part in a competition which could threaten the existence of Test Match cricket, and result in cricket suffering at all levels. Slade J. did accept that WSC posed at least a short term threat, but that this was not particularly serious and indeed that the profile of cricket could be raised. However, the long term threat, Slade J. decided, could be adequately met by the imposition of a *prospective* ban on players playing in unsanctioned games. Though such bans would not necessarily be valid they could be more easily justified than the *retrospective* action taken in the case of the clamants. Notably then, the Court recognised the importance of a single regulatory body which operated not just for the benefit of the 'elite', commercially attractive element of the game, but which also had a significant role in overseeing and promoting grass-roots activity. Slade J acknowledged that the game of cricket should be taken in its entirety and that the regulation of the whole of the sport was sufficiently important to permit limits on competing organisations such as World Series Cricket.

PUBLIC INTEREST MONOPOLY VS ABUSE OF POWER

Greig, though ultimately a success for the regulator, also highlights a tension between monopoly control by sports governing bodies – with attendant risks of abuse and problems of a lack of competition – and the public interest in sport's effective regulation. This issue has been considered in detail by the Court of Justice of the European Union in the case of *Motosykleistiki Omospondia Ellados Npid v Elliniko Dimosio (MOTOE)*.¹⁴

In *MOTOE* Greek legislation empowered the domestic body nominated by the International Motorcycling Federation (FIM) to authorise sporting competitions for motorcycles. The organisation appointed by the FIM was Elliniki Leshki Aftokinitoy kai Periigiseon (ELPA) which, as a consequence, had the right of veto over all races within the Greece. Would-be event organisers were required to submit a request for authorisation to ELPA, giving details of the venue or route and the safety measures. The new event could not clash with existing arrangements and the organisers were required to have their sponsors approved by ELPA. Consequently ELPA had a potential advantage in the organisation of motorcycle events where it acted in a commercial capacity, because of its regulatory monopoly over their approval and regulation. *MOTOE* applied to ELPA for a licence, but received no response. After a number of months, *MOTOE* brought a challenge to ELPA in the Greek courts, on the basis that the combination of ELPA's regulatory and commercial functions gave it a monopoly position which was open to abuse, contrary to EU competition provisions. The Greek court made a reference to the Court of Justice of the European Union seeking, amongst other things, clarification of the compatibility with European Union competition law of ELPA's combination of regulatory monopoly and commercial activities.

In applying Article 82 EC (now Article 102 TFEU) the Court acknowledged that ELPA was operating in two separate markets, first in the organisation of motorcycle events and, second, the commercial exploitation of those events through sponsorship, advertising and insurance activities. The Court identified the possession of special or exclusive powers as permitting ELPA to determine the extent of other undertakings' access to the market, and that this could put ELPA in a dominant position:

“51. A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic

¹⁴ Case C-49/07, *Motosykleistiki Omospondia Ellados Npid v Elliniko Dimosio (MOTOE)* [2008] ECR I-4863.

operators. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount *de facto* to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors. Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted by the fact, confirmed at the hearing before the Court, that, when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grant it the required authorisation.

52. Furthermore, such a rule, which gives a legal person such as ELPA the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates.”

This emphasises the problems which may arise as a consequence of the monopoly position of a sports governing body. Though the Court of Justice was somewhat reluctant to provide specific guidance as to when abuse might arise in this context – the matter was raised by way of preliminary reference meaning the Court was not required to determine the outcome of the case – it does make clear in its judgment that such power must be carefully exercised.¹⁵

The *MOTOE* litigation is not the only example of this sort of scenario which has come under scrutiny from the law. In *FIA & Formula One* the European Commission investigated the governing body of world motorsport.¹⁶ The Commission reviewed the FIA's regulations and commercial agreements relating to the FIA Formula One Championship in the light of requests for clearance from European competition rules. The Commission raised objections, arguing that FIA had abused its power by restricting promoters, circuit owners, vehicle manufacturers and drivers in ways that went beyond that necessary to protect its legitimate interests. The Commission accepted the necessity for sports governing bodies to exercise effective control over sports, sporting rules and competitions, but determined nonetheless that the notable commercial interests tied into Formula One required conformity with the demands of European Union competition law. Following discussions with the Commission the FIA agreed to change its regulations, agreeing to: limit its role to that of a sports regulator, with no commercial conflicts of interest; to exercise its licensing powers in such a way as to impose limitations on new competitions only on grounds related to the safe, fair or orderly conduct of motor sport; and to strengthen both internal and external appeals processes. As a result, the FIA leased for a period of 100 years its rights in the FIA Formula One World Championship and agreed to allow the creation of competing races and series.

A complete severing of regulatory and commercial functions is not necessarily a rigid requirement, Advocate-General Kokott noted in *MOTOE*:

“89. [. . .] If the behaviour of an undertaking in a dominant position can be objectively justified, it is not abuse. In fact, in a case such as this, there may be objective reasons

¹⁵ See generally, Weatherill, S ‘Article 82 EC and Sporting “Conflict of Interest”: the Judgment in *MOTOE*’ [2009]1–2 ISLJ 3; Miettinen, S ‘Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the *MOTOE* Case’ [2008] 3–4 ISLJ 13.

¹⁶ Case COMP/36.638, see European Commission, ‘Commission closes its investigation into Formula One and other four-wheel motor sports’ (Press release IP/01/1523, 30 October 2001).

why an association such as ELPA refuses to give its consent to the authorisation of a motorcycling event.

90. The existence of such an objective reason is particularly evident where, at a planned motorcycling event, the safety of the racers and spectators would not be guaranteed because the organiser did not take the appropriate precautions.

91. However, in addition to the purely technical safety requirements, there may be other objective reasons for refusing consent which relate to the particular characteristics of the sport. In a case such as this, it is worth bearing in mind the following considerations.

92. Firstly, it is in the interests of the sportspersons concerned, but also of the spectators and the public in general, that, for each sport, rules that are as uniform as possible apply and are observed so as to ensure that competitions are conducted in a regulated and fair manner. This applies not only to the frequently discussed anti-doping rules, but also to the ordinary rules of sport. If rules varied greatly from one organiser to another, it would be more difficult for sportspersons to participate in competitions and to compare their respective performances; the public's interest in and recognition of the sport in question might also suffer.

93. Consequently, the fact that an organisation such as ELPA makes the grant of its consent to the authorisation of a motorcycling event subject to compliance with certain internationally recognised rules cannot automatically be regarded as abuse. [. . .]

94. Secondly, it is in the interests of the sportspersons participating in the event, but also of the spectators and the public in general, that the individual competitions in a particular sport are incorporated into an overarching framework so that, for example, a specific timetable can be followed. It may make sense to prevent clashes between competitions so that both sportspersons and spectators can participate in as many such events as possible.

95. Consequently, the fact that an organisation such as ELPA makes the grant of consent to the authorisation of a motorcycling event subject to the requirement that the event must not clash with other events that have already been planned and authorised cannot automatically be regarded as an abuse. However, it goes without saying in this regard that, when establishing a national Greek annual programme for motorcycling events, ELPA must not give preference to the events (co-)organised or marketed by it over those of other, independent organisers.

96. The pyramid structure that has developed in most sports helps to ensure that the special requirements of sport, such as uniform rules and a uniform timetable for competitions, are taken into account. An organisation such as ELPA, which is the official representative of the FIM in Greece, is part of that pyramid structure. Under its right of co-decision in the authorisation by a public body of motorcycling events, it may legitimately assert the interests of sport and, if necessary, refuse to give its consent. However, a refusal to grant consent becomes an abuse where it has no objective justification in the interests of sport, but is used arbitrarily to promote the organisation's own economic interests, to the detriment of other service providers that would like to organise, and above all market, motorcycling events on their own responsibility."

This approach is consistent with that adopted by the High Court in *Hendry v World Professional Billiards and Snooker Association* where the combination of regulatory and commercial functions was not seen as objectionable *per se*.¹⁷ In *Hendry* a group of professional snooker players brought a challenge against the World Professional Billiards and Snooker Association (WPBSA) – the governing body of the sport – claiming that a rule limiting participation WPBSA approved tournaments amounted to an abuse of a

¹⁷ [2002] ECC 8.

dominant position. Notably, the players in the *Hendry* litigation were joined as claimants by 110 Sports – a company involved in the commercial aspects of professional snooker. This, in particular, emphasises that the range of potential stakeholders is much wider than those – such as players and clubs – more usually associated with challenges of this kind.

INTELLECTUAL PROPERTY RIGHTS AND CONTROL OF SPORTS

One potential alternative approach to the protection of sports events is through the imaginative application of intellectual property rights.¹⁸ Given that there has historically been limited necessity for such an approach, this is a relatively untried area of law. There is however, settled law on the existence of an intellectual property right, as such, in a sporting event. In *Victoria Park Racing v Taylor* it was established that a platform erected on land adjoining a racecourse, from which radio commentary was relayed, was not unlawful as there was no cause of action upon which the claimants could found an action.¹⁹ There was, it seems, no intellectual property right in a sporting event – the law had nothing upon which it could bite. This approach has, in broad terms, been followed since. In *BBC v Talksport* the BBC was unable to protect its exclusive rights to broadcast live radio commentary of the Euro2000 football tournament against commentary on television pictures broadcast “as live”.²⁰ Similarly in *Murphy v Media Protection Services* the Court of Justice of the European Union acknowledged the lack of any right in a sport itself.²¹ There have been some successes for event owners preventing ambush marketing through association with a competition or sport, primarily through the application of passing-off. Such litigation has generally been in respect of advertising and product promotions that draw links with a sport or event, rather than an organisation wishing to set up a rival organisation or competition.

Passing-off could arguably afford some protection to sports governing bodies; it is certainly possible to suggest that governing bodies, through their good regulation of the game, could build up ‘goodwill’ in their product. Whether the claim to be operating a particular sport could be an actionable misrepresentation is not clear. Further, whether the consumer would recognise the governing body of a particular sport as creating the goodwill in their product is doubtful; in *Rugby Football Union Ltd v Cotton Traders*, the High Court judged that consumers of replica team shirts of the England Rugby Union side made their associations with the team and players, rather than with the RFU as an organisation.²² This may serve as a significant limitation – in any case, the law of passing-off is limited to England and Wales; on this basis it would have little application in the context of global sport.

The potentially most useful approach to using intellectual property rights in protecting sports as a whole is that of the protection of formats. This has provided the foundation for significant commercial exploitation of, in particular, television shows. The leading case in this respect – *Green v New Zealand Broadcasting Corp* – demonstrates

¹⁸ See for a more wide ranging analysis, T Margoni, ‘The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection’ (August 29, 2015). Available at SSRN: <http://ssrn.com/abstract=2652991>.

¹⁹ (1937) 58 CLR 479.

²⁰ (2001) FSR 53.

²¹ Joined Cases C-403/08 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083.

²² [2002] EWHC 467.

both the potential and the limitations for the application of this approach.²³ In *Green* the case concerned the alleged infringement of the format rights in the popular talent show, *Opportunity Knocks*, in a show broadcast by the NZBC. The claim, based on infringement of copyright, was ultimately unsuccessful. This was on the basis that there were too few common elements as between the 'original' product and the allegedly infringing show. The court held that the key characteristics of the rights holder's show were not sufficiently faithfully replicated to evidence infringement. How, then, could this assist sports governing bodies in protecting their sports against 'free-riders'? The key element of sports in this respect are the rules that govern the game – though these have evolved, in many cases over a century or more – it is certainly arguable that the governing body of a sport has intellectual property rights in the format of the sport. It could equally be argued that even if such a right were to exist, it would, by now, have expired. However, more modern incarnations of particular sports, most obviously the example of Twenty20 Cricket, outlined above, must have potential to secure this type of protection. The new take on the game of cricket, which was fashioned by Stuart Robertson, then an employee of the England and Wales Cricket Board (ECB), has proven immensely popular in both domestic and international cricket. It has become to be perceived as the commercial 'powerhouse' on which many other, wider facets of the game of cricket can be founded. There do not seem to have been any claims made as to 'ownership' of the format as against other competitions – and perhaps, within the context of cricket's established regulatory structures, this is consistent with the idea of 'ownership' being attributed to those charged with stewardship of the game. It is surprising, particularly in the context of an environment where certain national regulators have been vociferous in their protection of their competitions, that litigation has not been launched on this basis.

CONCLUSIONS AND PROPOSALS: BALANCING REGULATORY STABILITY AND REGULATORY FAIRNESS

Sport needs unified and consistent regulation by its very nature; meaningful competition necessarily means playing by a uniform set of rules. The application of such a set of rules does not, of necessity, require that all competitions fall under the 'ownership' of the regulator, but it would certainly seem appropriate that, where the adoption of a sport by an 'unofficial' operator occurs, the regulator have some capacity to limit such activity in as much as it is damaging to the 'greater good' of the game. The tension between the public interest in the effective administration of sport and the economic interests of the various stakeholders in sport is manifest, but the law offers only piecemeal responses to the management of the problem. This, arguably, breeds uncertainty and conflict which, ultimately go against the best interests of sport and those involved with it.

How, then, can the law effect appropriate levels of protection for sports governing bodies – as 'stewards' of their sports – whilst preventing abuse of that position? The answer, I argue, is for the development of a *sui generis* intellectual property right in each sport, to be granted to recognised governing bodies, both at international and domestic level. This right would provide legal recognition and protection for sports governing bodies as 'custodians' of their respective sports. As such, an enforceable intellectual property right would prevent would-be challengers to sports regulators from breaking-away or, where external parties are involved, 'cherry-picking' the most commercially attractive parts of a given sport.

²³ [1989] 2 All ER 1056.

This proposal clearly reinforces the existing monopoly position of sports governing bodies, and with it the attendant possibilities of abuse. However, the granting of such a right would have attached to it responsibilities, in particular the equitable and fair treatment of those parties wishing to operate their own competitions under the auspices of the rights holder. In particular this could reflect the Opinion of Advocate-General Kokott in *MOTOE* on the appropriate balance between legitimate regulatory constraint and unreasonable commercial restriction. It might even extend to a requirement that sports governing bodies are limited to regulatory-only functions and that they do not engage in potentially conflicting commercial activities. Further it might reasonably compel a sports governing body to license at least some competitions, similar to provisions already existing in mainstream intellectual property law provisions.²⁴

The potential for such a scheme to be rolled out is clearly evidenced by the successful development and deployment of the World Anti-Doping Code (WADC). Almost all major, mainstream sports have been brought under the umbrella of the WADC – indeed this is a condition of a sport's inclusion in the Olympic Games²⁵ – and it has proven effective as a quasi-constitutional code, overriding conflicting rules and decisions of individual sports governing bodies.

²⁶Notably the WADC and its parent organisation, the World Anti-Doping Agency, are both supported and endorsed by nation states and by UNESCO, through the International Convention against Doping in Sport.

Arguably such an approach can provide certainty for sports regulators, while also ensuring that their conduct is not restrictive. Taken together this can be seen as providing stability, protecting the public interest in the regulation of sport, while permitting economic interests to be pursued. In particular this can be seen as elevating sporting interests above the commercial, not least by removing the fate of sports from the vagaries of the market.

²⁴ See e.g. s. 48 Patents Act 1977, s. 46 Trade Marks Act 1994.

²⁵ Article 40, Olympic Charter.

²⁶ CAS 2011/O/2422 *United States Olympic Committee v International Olympic Committee*, award of 4 October 2011; CAS 2011/A/2658 *British Olympic Association v World Anti-Doping Agency*, award of 30 April 2012.

THE CREATIVE IDENTITY AND INTELLECTUAL PROPERTY

JANICE DENONCOURT*

ABSTRACT

Intellectual property (IP) law awareness and education amongst creatives is an emerging theme of the IP policy agenda. This is important to society for socio-cultural growth, but also because research confirms that people with creative personalities are more likely to identify commercial opportunities, start a business and create employment, supporting economic development. This research found that to reach creative people it is important for IP law academics and experts to have a deeper understanding of the psychological traits that distinguish them from other cultural groups such as scientists or business people. How creatives perceive the value of the IP rights in their work influences their behaviour in identifying, managing and enforcing their rights. Through a discussion of 'creative identity' theory, linked to practical examples of thoughtful interventions by the Nottingham Creative IP Project (NCIP), this article examines how academics can transform IP educational practice to specifically target creatives.

INTRODUCTION

Society relies on creative people to enrich culture by producing the art, music, literature, and to design and invent new products that enhance our lives.¹ Although the fruit of creative work has a high profile in society, there are few studies in relation to intellectual property (IP) rights, culture and the creative identity. Artists and designers have specific and well-established IP rights, but lack awareness of their impact in an entrepreneurial and commercial context. What is the relationship between creatives and IP? How do creatives perceive the IP rights in relation to their work? An interdisciplinary approach begins with an appreciation of how those in other disciplines, such as art and design, think. Indeed, there is evidence of a new 'creative class' whose economic function is to create new ideas, new creative content and to innovate.

IP law is that area of law that concerns legal rights associated with the product of creativity (a cognitive process) and is classified in law as intangible property.² The term 'IP' is an umbrella expression for copyrights, related/neighbouring rights and industrial property rights although this list is not exhaustive. The interests of the creators are protected by legal IP rights afforded to the 'property' of their creation. These IP rights are the same as any form of property that is owned and gives the owner the right to assign, mortgage and license. The field of IP law plays an important role in human life by encouraging advancement in social, artistic and technical fields and provides creators with reputational and commercial opportunities.

This research analyses how creatives behave in relation to the IP rights that subsist in their creative work, a concept coined as 'behavioural IP'. Through a discussion of 'creative identity' theory and practice in IP law education, linked to practical examples of thoughtful interventions carried out by the Nottingham Creative IP Project

*Senior Lecturer, Nottingham Law School, Nottingham Trent University, BA (McGill), LLM (Bournemouth), PhD (Nottingham), Solicitor (England and Wales), Committee Member European Intellectual Property Teachers' Network.

¹ C Grégoire and S.B Kaufmann, 'Wired to create: Unravelling the Mysteries of the Creative Mind'.

² Adam D Moore, 'Intellectual property, innovation and social progress: the case against incentive based arguments' (2003) 26 *The Hamline Law Review* p 604.

and planned for the future, this article aims to make IP academics think about the common characteristics of the ‘creative identity’ enabling them to enhance how they communicate the IP law framework to creatives, key stakeholders in the IP regime. It will examine how academics can transform IP educational practice and engage more effectively with entrepreneurial creatives, assisting them to recognise and reflect on the IP rights that subsist in their cultural and potentially economically valuable creative works.

Research into the creative identity is important because the UK’s creative industries are world leaders and their contribution to the UK economy is considerable. Recent government figures show that UK creative industries are worth £76.9 billion per year to the economy – £8.8 million per hour. A report published by the London Development Agency described London as the ‘creative hub’³ and a global city in the creative industries sector. At the same time, IP – its creation, its protection, its management – has become a major area of concern in terms of economic development worldwide. Further, according to Hartley:

The creative industries are important because they are clustered at the point of attraction for a billion or more young people around the world. They’re among the drivers of demographic, economic and political change. They start from the individual talent of the creative artist and the individual desire and aspiration of the audience. These are the raw materials for innovation, change and emergent culture, scaled up to form new industries and coordinated into global markets based on social networks.⁴

The emergence of new ideas and creative works underpins economic development, creating employment, commercial and socio-cultural growth. Offering legal protection for the creation of ideas and innovation is the essence of the IP law framework the purpose of which is to stimulate and encourage the creation and diffusion of ideas crucial for cultural and economic development. To achieve this aim, the IP law framework provides a preventative mechanism to safeguard ideas, and prevent others from misappropriating protected creative works.⁵ However, creatives lack sufficient awareness of the IP rights legal framework and the topic rarely features in the curriculum of tertiary art and design programmes. Consequently, international and national IP organisations seek to address these concerns about the lack of IP knowledge and experience of creatives through education and IP awareness programmes.

At the international level, the World Intellectual Property Office⁶ (WIPO) Academy was established in 1998 and plays a central role enhancing the capacity of countries to use the IP law system. WIPO adopts an interdisciplinary approach to IP education and has identified the need to focus on the creative industries, among other sectors.

Presently, IP law awareness and education is also a prominent theme of the UK Intellectual Property Office (UKIPO) policy agenda. In 2012, a National Union of Students study co-funded by the UKIPO, found that although 80% of students felt that knowledge of IP was important to their education and future career, only 40% thought their current awareness of IP was enough to support them in their future career. Students who were surveyed indicated that they wanted better access to information on IP but

³ John Hartley, “The evolution of the creative industries – Creative clusters, creative citizens and social network markets.” (2009) *International Perspectives on the Creative Economy*. Sunchime Publishing China, Pp 1–20.

⁴ *Ibid*.

⁵ C Colston, *Modern Intellectual Property Law* (2010) Routledge p 44.

⁶ The World Intellectual Property Organization is one of 17 specialized agencies of the United Nations. WIPO was created in 1967 to encourage creative activity, to promote the protection of IP throughout the world and it provides a global policy forum, where governments, intergovernmental organizations, industry groups and civil society come together to address evolving IP issues.

were not clear on how to obtain this information.⁷ Further, in the UK initiatives are underway to attempt to show the value the arts contribute to society and the economy in response to the ‘age of austerity’ and ensuing cuts in public funding. In 2010–2011 public ‘grant-in-aid’ funding to the Arts Council was £450 million and in 2014–2015 stood at £343 million, a substantial reduction in investment.⁸ Assisting entrepreneurial creatives to nurture their IP rights has the potential to impact on UK government policies for funding art and design.

The IP Awareness problem and entrepreneurial creatives

The lack of IP awareness and knowledge amongst creatives is particularly important when taking into account research that confirms that people with creative personalities are more likely than others to identify business opportunities and start a business. The genius of the contemporary artist is not unlike the genius of the entrepreneur. The urgent need in the fast-paced modern world in economic and technological change for people who are creative, innovative and flexible⁹ is driving the new ‘creative class’ whose economic function is to create new ideas, new creative content and innovate.¹⁰ This group of people are known as ‘entrepreneurial creatives’ who also share common genetic influences.¹¹

Creatives, especially visual creatives, are notoriously uninterested in academic subjects such as law, and their scholastic records usually reflect this. It is probably for this reason that the French say *bête comme un artiste* (dumb as an artist) when they want to insult someone’s intellect.¹² Although creatives are generally aware of the phenomenon of IP rights, which play an increasingly important role within their discipline, they are light on the detail and view the bundle of IP rights collectively as a colossal concept or as a tangle of uninteresting laws that are remote from their work. The exponential growth in the various ways in which works of art and design can be viewed, experienced and enjoyed has resulted in even more legal rules. For example, the rise of digital media and user-created content illustrates the extent to which creativity is attributable not to creators alone, but also to socially networked participants or consumers. This often results in creative IP being shared, not controlled by the creator.

Further, creatives are often confounded by extensive discussion of statute and case law which forms the basis for the specific legal categories: copyright, moral rights, design, trade mark and patent law. This exemplifies the human dimension in that creatives with a non-law background find it difficult to relate abstract IP law concepts directly to their own art and designs (works made in concrete acts), and as a form of transferable property that underpins legal transactions.

In contrast, IP law specialists and educators take an analytical look at the building blocks of an artistic work or design (the product of creative efforts) in order to evaluate subsistence of copyright, design right, authorship, ownership and infringement. They are mystified by the creatives’ apparent lack of interest in or seemingly unsympathetic

⁷ *Student attitudes toward intellectual property* (2015) A Report published jointly by the National Union of Students, the Intellectual Property Awareness Network (IPAN) and the UKIPO.

⁸ <https://www.gov.uk/government/policies/supporting-vibrant-and-sustainable-arts-and-culture>.

⁹ K. Robinson. *Out of our minds: Learning to be creative* (2007) Wiley-India, New York, USA.

¹⁰ R. Florida. *The rise of the creative class: And how its transforming work, leisure, community and everyday life* (2003) Pluto Press, North Melbourne, Victoria, Australia.

¹¹ S. Shane and N. Nicolaou, ‘Creative Personality, opportunity recognition and the tendency to start business. A study of their genetic predisposition’ (May 2015) *Journal of Business Venturing*, Vol. 30 (3) pp 407–419. The authors examined a sample of 3242 twins from the United Kingdom which they surveyed in 2011 confirming that people with creative personalities are more likely than others to identify business opportunities and start businesses.

¹² Mihaly Csikszentmihalyi, *Creativity: The Psychology of Discovery and Invention* (2013) Harper Perennial; Reprint edition. See Part I The Creative Personality, p 178.

view of the IP law regime which offers them substantial legal protection for their economically valuable property rights. There is a cultural divide between the two tribes, and a wise IP law specialist needs to be especially aware of the sensitivities of the other tribe.

What is needed is an effective discourse regarding protection for the creator (and the first owner) in the field of creative art & design. IP rights can be complex, but are important for creatives to understand even during the process of creation. The distinction between inspiration and copyright is a key legal issue for creatives, especially to ensure they are not infringing third party IP rights. Having insight into the psychological theories that underpin the 'creative identity' will allow IP law specialist educators improve the way they communicate the IP law conceptual framework to creatives, useful knowledge creatives can put into practice in their future professional careers and as creative entrepreneurs.

The Nottingham Creative IP Project (NCIP) project was conceived on the basis of the interest shown by the various IP bodies above in IP awareness and education and the fact that Nottingham Trent University has key strengths in both legal education and the creative fields. The flow of talented art and design students who become successful creative professionals is a vital. So too is the ability of these entrepreneurial creative individuals to identify, protect, manage and exploit their IP for their own personal benefit and for society as a whole. The challenge faced by the creative sector is to know how, when and why they should manage their valuable IP.

The rest of this article sets out the background to the NCIP project followed by a discussion of IP rights and the creative identity, including the psychological traits of creatives and theories relating to creativity. This research provides the foundation for how the NCIP will continue to address raising IP awareness amongst this cultural group and the potential impact of the project.

THE NOTTINGHAM CREATIVE INTELLECTUAL PROPERTY PROJECT

In 2014 Nottingham Law School responded to the UKIPO's challenge to raise IP awareness and launched the NCIP project with £69,000 funding from the Fast Forward Competition.¹³ The NCIP is a collaborative project involving the Nottingham Law School and its IP Research Group, the Legal Advice Centre¹⁴, the HIVE¹⁵, the School of Art and Design and the College of Art, Design and Built Environment (CADBE), several Nottingham IP specialist law firms¹⁶, numerous award winning designers, inventors, entrepreneurs and more recently, City University in London. Nottingham Law School joined with the other schools to work together to make a bigger impact on the issue of raising IP awareness amongst creatives. The IP law experts on the team were Dr Janice Denoncourt, Senior Lecturer in Law, and Jane Jarman, Reader in Law, both in professional legal practice before becoming academics.

A number of existing outputs by NCIP members identified and addressed aspects of the IP awareness problem amongst creatives. The NCIP project began with a series of five themed workshops and clinics held in 2014 to show creatives how to identify,

¹³ The Fast Forward Competition (2011–2014) provided funding to universities and Public Sector Research Establishments to encourage collaboration with businesses and local communities on innovative projects that benefitted the UK economy and society.

¹⁴ See http://www.ntu.ac.uk/legal_advice_centre/.

¹⁵ See <http://www.ntu.ac.uk/hive/>.

¹⁶ The law firms supporting the NCIP project include Browne Jacobsen, Eversheds, Nelsons and Potter Clarkson.

protect, manage, exploit and enforce the IP rights that might subsist in their creative work. More than 200 participants attended 8 workshops, attracting key players in the creative industries. From creative industry experts and entrepreneurs to specialist IP lawyers, they all shared their IP experiences. Entrepreneurial creatives with business ideas also had the opportunity to receive pro bono legal advice from the Nottingham Law School's award-winning Legal Advice Centre. Using the university's own talent pool, 40 students from the Law School provided the IP advice, with guidance from experienced IP staff and lawyers. The pro bono IP clinics proved to be popular, with the students delivering 33 clinics. As a result of the success of these clinics, 4 businesses received more in-depth follow on support from local law firms.

The experiences of each participant fed into the main focus of the project, an IP guide for the creative industries which will be discussed further below. The NCIP team learned that appealing to the 'creative identity' is challenging as creatives are highly autonomous and in particular, dislike identifying with what they perceive as commercial or financial incentives, indeed the benefits that IP rights can provide. Indeed, some creatives view members of the corporate tribe (such as business people and lawyers) as killers of creativity who impede or destroy creativity. The NCIP team found that this makes the task of engaging creatives with IP law even more difficult than engaging those in other disciplines such as science, technology, engineering and maths (STEM), IT, accounting, finance and business.

Tailoring IP law to creatives

Published in May 2015, the *Nottingham Intellectual Property Guide for Creatives* (the *Guide*) is something of a first.¹⁷ It was designed specifically to appeal to creatives and is different to a traditional law book. The NCIP's *Guide* is unique because it provides creative sector specific IP information to help creatives understand fundamental IP law principles. Rather than adopt the traditional IP law learning approach which typically covers each type of IP right separately e.g. copyright, design, trade marks, patents and the doctrine of confidential information¹⁸, the *Guide* is structured as follows:

IP for Design;
 IP for Performance;
 IP for Image and Media;
 IP for Interactive Media; and
 IP for Art and Architecture.

Informal feedback was that this approach to aligning IP topics to creative output was beneficial as it addressed identifiable creative sectors in categories immediately familiar to creatives. In addition, in modern society, there are many more female creatives in the past and the *Guide* reflects the creative talent of women and racial diversity.¹⁹

Second, the *Guide* includes a series of real life case studies to illustrate the application of the IP rights to the business practices of experienced and successful entrepreneurial creatives, members of their own tribe. The NCIP project team hypothesised that creatives' actions follow from being 'reminded' about others' success. Based on experiences gained in the NCIP workshops, the *Guide* introduces how experienced and successful entrepreneurial creatives have actually applied IP law principles to their business

¹⁷ Janice Denoncourt, Estelle Paley, Jane Jarman, et al (2015) *The Nottingham Intellectual Property Guide for Creatives*.

¹⁸ For an example of a traditional approach to IP material see the UKIPO's *IP Basics for Business Owners* booklet.

¹⁹ Susi Henson, Eternal Spirits: corsetry designer; Jodie Aysha: singer; Lauren Knifton: blogger; Emma Ball: artist; and Zaha Hadid (deceased): award-winning architect.

practices, positively adding value to their own IP. The *Guide* profiles NCIP event speakers including: Susi Henson (fashion designer); Mark Tughan (The Glee Club owner); Martin Shakeshaft (Photojournalist); Alistair Clark (Wellington Films Ltd); Lauren Knifton (blogger www.theladyinwaiting.org); and Emma Ball (artist and owner of Emma Ball Ltd). The *Guide* was carefully designed to ensure the case studies were diverse in terms of creative sectors and type of IP rights issues and effectively supported the narrative IP material in each chapter to help creatives deal with their own IP rights strategically, without an alien feeling that “this is NOT what creatives do”, rather “this IS what creatives do”. Seven of the case studies (the majority) focussed on how entrepreneurial creatives dealt with IP infringement issues including a theme of the moral right of paternity (also known as the right of attribution).²⁰

Third, the visually appealing *Guide* has been well-received by creatives who rely more on visual learning.²¹ In *Visual Thinking*, a ground-breaking and now classic work, Arnheim cast the visual process in psychological terms. He argued that perception is strongly identified with thinking and that perception is another way of reasoning, leading to a conclusion that there is a need to educate the visual sense. Stunning illustrations were carefully selected by the NCIP team working together with graphic designer Jason Holroyd to visually interest creatives, drawing them into the text – imagery typically neglected and lacking in traditional law books, law being a discipline almost exclusively dominated by text.

Currently the *Guide* is available as an open-access e-book on NTU Institutional Repository page and in NTU library. Softback and e-copies were distributed in the UK and internationally to creatives and IP law teachers in Higher Education. Evidence of the positive impact of the *Guide* as an IP education resource is supported by formal endorsement from the Director of Innovation, UKIPO; EU Regional Development Fund; Writers’ Guild; Chartered Society of Designers and Ian Livingstone CBE. In terms of dissemination, to date over 500 soft and e-copies of the *Nottingham Intellectual Property Guide for Creatives*²² have been distributed in the UK and beyond, helping creatives gain much needed IP knowledge and skills to move their ideas and innovations from the drawing board into the market place. The impact of the NCIP publication is such that in 2015–2016 a copy will be provided to each graduate of the School of Art & Design.

The positive reception of the NCIP’s first IP awareness publication aimed at creatives paved the way for the second stage of the project. In March 2015 the NCIP team was awarded £24,980 in the UKIPO’s StudentSHIP Enterprise Awards, to continue to help art and design students protect their IP, in particular during their final year degree shows as they embark on their professional careers beyond university.²³ However, although the NCIP team recognised that the use of visuals and case studies featuring experienced entrepreneurial creatives had been successful it was felt that for the project to continue to develop a deeper understanding of ‘creatives’ was needed. Drawing on work already carried out by the NCIP project, the research in next section delves deeper into culture and the creative identity to ask: how will an advanced understanding of the ‘creative identity’ help the NCIP team to further engage creatives in the IP law framework in the second stage of the project? The research began with overview of the role of the IP

²⁰ The moral right to be identified as the author of a work, known as the right of paternity or right of attribution, is set out in s77 Chapter IV *Copyright, Designs and Patents Act 1988* and must be asserted by the author/creator.

²¹ Rudolf Arnheim. *Visual Thinking* (2004) University of California Press.

²² *The Nottingham Intellectual Property Guide for Creatives* (2015) Nottingham Trent University Publications is free to download at: http://www.ntu.ac.uk/services_for_business/support/creative_intellectual_property_project.html.

²³ See <http://ipo.blog.gov.uk/2015/01/30/studentship-enterprise-awards-finalists-announced/>.

law framework, creativity in culture and social identity, followed by a discussion of the modern research into the psychological traits of creative identity.

IP RIGHTS, CULTURE AND THE CREATIVE IDENTITY

Cultural elements raise problems and opportunities. In the context of the IP law regime, the crucial role for policy makers such as WIPO, the UKIPO, IP academics and educators is to identify them and respond to them in line with their culture. Culture may have an effect on attitudes, values, beliefs, and behaviour.²⁴ A number of scholars have proposed the value of engaging in cultural research and law. Austin Sarat and Jonathan Simon for example analysed the cultural perspective of law by concentrating on the relationship between cultural lives and law.²⁵ Olwan recommended that countries take into account social context (e.g. for our purpose, a social group such as the ‘creatives’) and culture to form the reason for engaging with and respecting IP laws, ultimately to assist a country achieve its goals for social and economic growth.²⁶ This understanding may help to provide applicable solutions and improvements to raising the IP awareness in creatives in line with their social group culture. A social identity is another portion of an individuals’ self-concept derived from perceived membership in a relevant social group e.g. creatives. As originally formulated by Henri Tajfel and John Turner in the 1970s and 1980s, social identity theory introduced a way in which to explain inter-group behaviour –predicting certain intergroup behaviours on the basis of perceived group status difference, the perceived legitimacy and stability of these status differences and the perceived ability to move from one group to another.²⁷ There are a number of ways this impact can be assessed, not the least of which is by examining attitudes, values, beliefs and behaviour. In doing so, policy makers can improve policies to foster a positive relationship between creatives and their understanding of the IP law framework and the benefits it affords.

For the NCIP project, the definition of who is a ‘creative’ is culturally broad and not confined to starving artists in a garret or creative geniuses. Rather, the term includes the modern social group of people who create unique, rare or remarkable creations that have distinctive value to society as well as artisans, craftspeople or designers whose creations may be mass-produced, replaceable consumer goods, reflecting modern culture. In modern society we are surrounded by a plethora of creative works and the idea of being creative is embedded within our culture in a way that simply did not exist centuries ago. Something is in the air. The wind has blown in a cultural shift which WIPO, the UKIPO and IP law educators have to address, namely, a new norm in relation to creativity which suggests that each generation of society should be more creative than the last, will be exposed to more creative works than previous generations and a mounting imperative to be industrially creative.²⁸ This illustrates how culture has evolved to give rise to a new public discourse involving stimulating economic growth to achieve a higher standard of living spurred by entrepreneurial creativity. According to Pitkethly, an important role of the IP rights system is to act as an incentive to invest time, effort and resources

²⁴ David Pimentel, “Culture And The Rule Of Law: Cautions For Constitution-Making” (2014) *A Road Map Of A New Constitution For Turkey* (1st ed.) Carolina Academic Press, p 82.

²⁵ D. Tan, ‘Going GaGa: Intellectual Property and Pop Culture’ (2012) 4 *The WIPO Journal*, p 64.

²⁶ Rami M Olwan, *Intellectual Property and Development* (2013) Springer Verlag.

²⁷ Mihaly Csikszentmihalyi, ‘The Creative Personality’ (1 July 1996) *Psychology Today*.

²⁸ C Dent, “Legal Academics, our creativity and why we do it: insights from Foucault” (2014) *The Law Teacher* Vol.48, No.3, p 232.

in creations. This is true, however, creators must firstly be aware that the IP system actually exists and secondly, have sufficient knowledge as to how the system works in order to access it and use it efficiently resulting in a reasonable chance of obtaining the benefits offered.²⁹ In other words, if we want creatives to learn about the IP system, IP experts and educators need to ensure creatives pay attention to the information to be learned.

In summary, cultural factors in relation to accessing the benefits of IP rights have the potential to enhance the social behaviour³⁰ and the economic growth which philosophers seek to achieve through theories to justify the legal protection afforded to IP rights.

Cultural justifications for IP rights: internal and external motivators to create

Encouraging and incentivising creative individuals is at the heart of the justification for the IP rights legal regime. However, the IP system is usually not part of the creative process or the academic syllabus for creatives. This section explores the interaction between creatives with the societal policy of increasing their awareness of their potential IP rights. This is relevant because the outputs of creatives are extensively legally protected by IP laws, especially unregistered IP rights such as copyright, moral rights and design law, rights which may also overlap.³¹

In essence, IP rights have three key features. First, they are property rights. Second, they are property rights in something intangible. Third, they protect creations and reward creative activity. A central characteristic of IP rights is that they are negative monopolistic rights: they exclude others from the use and exploitation of the subject matter of the right. However, legal and political scholars have often challenged the status and legitimacy of IP, and have raised the issue of why IP rights must be offered protection.³² The existence of IP rights is usually justified by reference to one or more of the following philosophical theories including the natural rights (reward) theory and the personality theory.

Providing creators with economic incentives to create new works is the concept that underpins the natural rights (reward) justification for the expansion of IP rights protection. In essence, a person who puts intellectual effort into creating something should have a natural right to own and control the creation.³³ Such an entitlement is now recognised in Art 27(3) of the *Universal Declaration of Human Rights*, which states:

Everyone has the right to the protection of moral and material interests, resulting from any scientific, literary or artistic production of which he is the author.

According to Dent, there is a tension in the literature around the target of the incentive. For some the target is the creator, for others, it is the firm that employs the creator.³⁴ Here, the aim is to better understand creatives, the creative identity, their values and practices. Most studies relating to the creativity identity focus on the creative mental process to try to figure out how and why creative individuals are able to do things in ways that are more original than what most people are generally capable of achieving.

²⁹ R Pitkethly, 'Intellectual Property Awareness & SMEs' (2006) *World Intellectual Property Organization*.

³⁰ Ronald Benabou and Jean Tirole "Incentives and Pro-social Behaviour" (2006) 96 *American Economic Review* 1652.

³¹ Estelle Derclaye and Mathias Leistner, *Intellectual Property Overlaps: A European Perspective* (2011) Bloomsbury Publishing plc.

³² Lionel Bently and Brad Sherman, *Intellectual Property Law* (2014) Oxford University Press, p 3.

³³ This is a summary of the Labour Theory by 17th century philosopher John Locke. He argues that everyone has a property right in the labour of this own body, and that the appropriate of an unowned object arises out of the application of human labour to that object.

³⁴ n[28] pp 228–247.

There are several motivations to create, both internal and external. Amabile emphasizes the close relationship between intrinsic motivation and “creative” by arguing that such individuals like doing what they are doing, and when they begin to worry too much about fame and riches (external motivators) their work suffers. Creators themselves speak of ‘compulsion, joy and other emotions and impulses that have little to do with monetary incentives’.³⁵ In summary, intrinsic motivation is conducive to creativity, but extrinsic motivation, such as financial incentives, has the propensity to be detrimental to and reduce creativity.³⁶ Nonetheless, an alternative view is presented in the autobiography of the famed Renaissance goldsmith Benvenuto Cellini (1500–1571) to realise how important money can be to a creative as a gauge of self-worth. Presumably creatives respond to financial incentives to a lesser extent than most people, but they do so nevertheless.³⁷

Consequently, the important point for IP law specialists and educators is that the ‘reward theory’ although still important, has limitations when applied to creatives. This hypothesis aligns with numerous discussions that took place at the NCIP project IP awareness raising events and question and answer sessions.

Reputational motivators to create

Creative work can also lead to reputational success and be coveted by others. Such reputational motivators are external to the creator and are based on how others react to the creator’s work. Another traditional justification for the existence of the IP law framework is the ‘personality theory’ which rests on the manifestation of the creator’s personality, to show that he or she is distinct or thinks differently than others. The famous philosophical writing is Hegel’s theory of property whereby creation is an extension of the creator’s individuality or person, belonging to that creator as part of his or her selfhood.³⁸ This justification suggests that property provides an especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual.³⁹ The personality theory underpins the existence of the moral rights (a form of statutory IP right) which attaches to most copyright-protected works, the most important form of IP right protection for creative works.⁴⁰ Moral rights broadly protect the creator’s work as a reflection of the creator in terms of (1) attribution: the right of the creator to have ‘due acknowledgement’ whenever the work is used or reproduced; and (2) integrity: protection from the use or reproduction of the work in some way that is derogatory, potentially undermining the original work and the reputation of the creator.⁴¹ The NCIP adopted the theory that focussing on reputational motivators is more likely to be successful when engaging creatives in IP awareness activities.

IP law enforcement motivators

IP law also provides mechanisms by which a creator (or the IP rights owner) may be economically compensated for unauthorised misuse of their work. Although unauthorised

³⁵ Rebecca Tushnet, “Economics of Desire: Fair Use and Marketplace Assumptions” (2009) 51 *William and Mary Law Review* 513, p 546.

³⁶ T.M Amabile, *The Social Psychology of Creativity* (1983) Springer-Verlag, New York at p 15; and Mihaly Csikszentmihalyi, *Intrinsic Rewards and Emergent Motivation in The Hidden Costs of Reward: New Perspectives on the Psychology of Human Motivation* (1978) Hillsdale, New York, pp 205–216

³⁷ n[12] p 335.

³⁸ J Hughes, ‘The Philosophy of Intellectual Property’ (1998) 77 *Georgetown Law Journal*, p 330.

³⁹ *Ibid* p 331.

⁴⁰ Chapter IV, *Copyright Designs and Patents Act 1988* (UK).

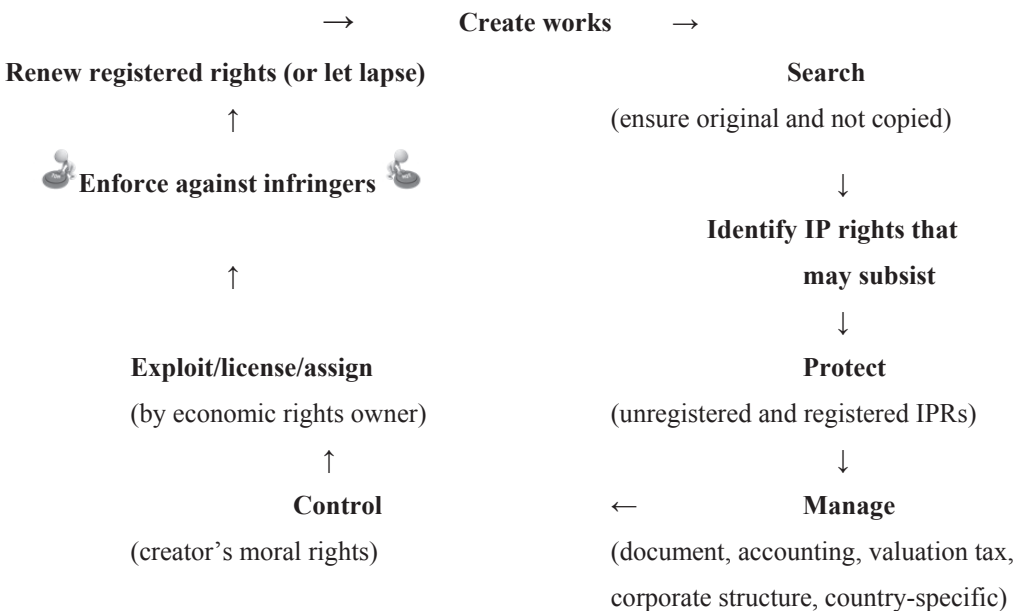
⁴¹ *Ibid*.

copying has always been a problem, in the last few decades the Internet has exponentially increased the risk of creative works being easily copied. This has led to policy initiatives by governments to ensure creators are well-placed to protect and enforce the IP rights in their work to stop the flow of income streams being lost. The misappropriation of creative work is also likely to be a trigger point for engaging creatives as in effect, an aspect of themselves, their creative identity, has been taken. In terms of IP law, the case law is unequivocal, the quality of what is taken is more important than the quantity. Infringement cannot be determined solely by a quantitative review, the amount taken is important but not the sole determinant.⁴²

The IP Life Cycle for Creatives and their Hot Button

These cultural motivators shape the IP law framework and impact on the relationship between creatives and IP. How creatives perceive the value of the IP rights in relation to their work will influence their behaviour in identifying, protecting, managing and enforcing their IP rights. The author has designed the “IP Lifecycle for Creatives” set out below in Figure 1 to represent the stages a creative work undergoes from creation until the IP monopoly expires, a model that strives to explain the pattern of IP activities relevant to creatives.

Figure 1 The IP Life cycle for creatives and their hot button



The NCIP team soon realised that in order to successfully engage creatives, it is important to know their “hot buttons”. From the beginning of the NCIP Project in 2014, we spoke with dozens of art and design students informally at our IP awareness raising events and during the networking periods. We also responded to numerous questions raised by creatives in the audience during the Panel Discussion and question and answer sessions regarding infringement issues. The team noted that the creatives who attended our events were not especially concerned about monetary reward, particularly

⁴² *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR273 at 293.

the students at an early stage in their career. Nor, surprisingly, did creatives often seek information on being acknowledged as the creator of their work as they were often involved in joint projects. Rather, the point at which the creatives' interest in the IP rights that might subsist in their creative work arose was when their work was copied or used without their permission. The NCIP team determined it was important to recognise the interest in IP by creatives when it showed itself. One example, was Martin Shakeshaft, an established freelance photojournalist best known for his iconic photos of the 1984 miners' strike (www.strike84.com) who spoke at the NCIP 'IP for Image and Media' event in 2015. Martin admitted that when he started out in his career he knew little about IP, but his knowledge had grown over the years. Hearing Martin speak about copyright infringements of his photos was a revelation. He revealed that "in one year over a third of my income came from pursuing infringers who agreed to pay for a licence to use my work".⁴³

There is no doubt that over his career entrepreneurial creative, Martin, has developed a responsible and disciplined attitude toward his IP rights – a paradox contrary to the usual perception of creatives as irresponsible, non-commercial and uninterested in IP law? Or is this paradoxical trait part of the creative identity?⁴⁴

The NCIP learned that the majority of creatives' concerns centred on dealing with potential infringers. This was the critical juncture for engaging creatives as at this point they had an immediate desire to acquire a more detailed understanding of their IP rights. This IP knowledge "hot button" can be contrasted to those who operate in the technology sector who must register their IP rights for them to exist (e.g. designs and patents) and who consequently require IP knowledge much earlier in the creation/innovation process. In summary, it was the NCIP team's experience that creatives' interest in IP law peaks when they experience (feel pain) when their creative work has possibly been copied. However, for IP experts and academics, this juncture is arguably too late in the IP Lifecycle for Creatives. The second phase of the NCIP project aims to raise creatives' awareness of the IP law framework much earlier, well before the serious problem of unauthorised copying has occurred. To do so, we needed to learn more about the psychology of creative identity and how to engage them earlier, while they were in the process of creation.

PSYCHOLOGICAL TRAITS OF CREATIVES

The NCIP determined that to reach creative people it is important to know the psychological traits that stimulate and distinguish creativity. To access this information in a commercial or business context, we considered the literature concerning this personality type.⁴⁵

According to Mihaly Csikzentmihaly, a leading psychologist in the field of the creative personality, "If there is one word that makes creative people different from others, it is the word complexity."⁴⁶ Figure 2 sets out several key traits of creatives that describe this psychological complexity:

⁴³ n[17] p 52.

⁴⁴ n[17] at pp 52–53, the NCIP case study profiling Martin Shakeshaft.

⁴⁵ Douglas Bray, Brain Steffy and John W Jones *Applying Psychology in Business: The Handbook for Managers and Human Resource Professionals* (1990) Lexington Books, USA.

⁴⁶ n[12] pp 51–75.

Figure 2 Psychological Traits of Creatives

1. Independence
2. Openness
3. Tolerate ambiguity
4. Willingness to take risks
5. Heightened aesthetic judgement
6. Think visually
7. Tendency towards androgyny
8. Persistent

Source: Adapted from Csikszentmihalyi, M. *Creativity: The Psychology of Discovery and Invention* (2013)⁴⁷

The creative process – from the first drop of paint on the canvas to the art exhibition – involves a mix of emotions, drives, skills and behaviours. As part of his research methodology, Csikszentmihalyi⁴⁸ interviewed 91 eminent, mostly American caucasian creatives across various fields. An introduction to the psychological traits of creatives he identified is discussed below.

The first distinguishing trait is independence. Creative people (e.g. artists, illustrators, graphic designers, product designers, writers and filmmakers among others) highly value independence. They resist discipline. They bridle at traditional constraints. Consequently, it is important for those who communicate and attempt to educate them to acknowledge the intensity of this need for independence. This trait helps to explain the propensity of creatives to become entrepreneurs.

Second, creative people are open to and nurture new ideas. They are slow to judge and are willing to give a personal project time to blossom. At the same time, they have ‘ownership’ of their ideas, and they love the process of discovery.⁴⁹ Thorstein Veblen in *The Beginning of Ownership* stated that, “The unsophisticated man, whether savage or sophisticated, is prone to conceive phenomena in terms of personality.”⁵⁰

Third, creatives tolerate ambiguity. They consciously examine different perspectives and are rarely dogmatic or insular. Nobel laureate Albert Szent-Gyorgyi once said, “Discovery consists of looking at the same thing as everyone else-and thinking something different.” Thinking differently or imaginatively is at the heart of the creative process. ‘Imagination’, Stevenson said, ranges from “the ability to think of something not presently perceived, but spatio-temporally real” to “the ability to create works of art that express something deep about the meaning of life”.⁵¹ Gregory Currie and Ian Ravenscroft focus on *creative imagination* explaining that this involves combining ideas in unexpected and unconventional ways.⁵² The most creative people tolerate ambiguity and show a preference for dealing with unstructured problems, problems that may not have one right answer. This is helpful when discussing the application of legal principle applied to different sets of facts. This relates to the theory

⁴⁷ n[12] pp 51–57.

⁴⁸ Mihaly Csikszentmihalyi is noted for his work on creativity and the psychological concept of flow, a highly focused mental state and intrinsic motivation. He is the Distinguished Professor of Psychology and Management at Claremont Graduate University and is the former head of the department of psychology at the University of Chicago.

⁴⁹ David H Lyman, *The Creative Personality* (2008) available at http://www.dhlyman.com/DHlyman.com/Davids_Bio.html.

⁵⁰ T Veblen, “The Beginning of Ownership” (1898–9) Vol.4 *American Journal of Sociology*.

⁵¹ L Stevenson, “Twelve Conceptions of Imagination,” (2003) *British Journal of Aesthetics*, 43(3): 238–259 at p 238.

⁵² G Currie, and I Ravenscroft, *Recreative Minds: Imagination in Philosophy and Psychology* (2002) Oxford University Press; see also n [39] p 74.

of plasticity- convergent-divergent thinking. Psychologists Guillaume Furst, Paolo Ghisletta and Todd Lubart identify three ‘super factors of personality that predict creativity: plasticity, divergence and convergence’.⁵³ It is widely assumed that artists, musicians, writers, painters, are strong on the fantasy side, whereas scientists, politicians and business people are realists. Convergent thinking is a term coined by Joy Paul Guilford⁵⁴ as the opposite of divergent thinking. It generally means the ability to give the ‘correct’ answer to standard questions that do not require significant creativity, for instance in most tasks in school and on standardized intelligence tests. Conversely, divergent thinking typically occurs in a spontaneous, free-flowing manner, where many creative ideas are generated and evaluated. Multiple possible solutions are explored in a short amount of time, and unexpected connections are drawn. After the process of divergent thinking has been completed, ideas and information are organized and structured using convergent thinking. Decision making strategies are used leading to a single-best, or most often correct answer. Divergent thinking (being creative) is perceived as deviant by the majority and so the creative person may feel isolated and misunderstood.⁵⁵

Fourth, thinking differently implies a willingness to take risks.⁵⁶ Accordingly, creatives test the boundaries and prize originality. However, once a sufficient amount of ideas has been explored, the creative turns to convergent thinking. Creative people tend to be introverted and extroverted; rebellious and conservative; passionate yet objective.⁵⁷ Csikszentmihalyi states:

In fact, in current psychological research, extroversion and introversion are considered the most stable personality traits that differentiate people from each other and that can be reliably measured. Creative individuals, on the other hand, seem to express both traits at the same time.⁵⁸

Fifth, creative people have a heightened aesthetic judgement and an exceptional sense of form and beauty.⁵⁹

Sixth, creative people use mental imagery and think visually.⁶⁰ The “propositional” or “descriptive” theory holds that visual mental images are non-pictorial, language-like representations of visual scenes.⁶¹

Seventh, creative individuals to a certain extent escape rigid gender role stereotyping and there is a tendency toward psychological androgyny. Psychological androgyny refers to a person’s ability to be both aggressive and nurturant, sensitive and rigid, dominant and submissive – effectively doubling a creative’s repertoire of responses when interacting in the world.⁶²

⁵³ ‘The Messy Minds of Creative People’ Scientific American blog at www.thecreativemind.net.

⁵⁴ Joy Paul Guilford (1897–1987) was an American psychologist known for his psychometric study of human intelligence, including the distinction between convergent and divergent production. Guilford proposed that three dimensions were necessary for accurate description: operations, content, and products.

⁵⁵ Mihaly Csikszentmihalyi, *Creativity: The Work and Lives of 91 Eminent People* (1996) Harper Collins.

⁵⁶ Thomas William Nielsen, Robert Fitzgerald and Mark Fettes *Imagination in Educational Theory and Practice: A Many-Sided Vision* (2010) Cambridge Scholars Publishing, pp 1–21; n[12] p 72.

⁵⁷ n[12] pp 71–72.

⁵⁸ n[12] p 65.

⁵⁹ n[12].

⁶⁰ P F Strawson, “Imagination and Perception,” in *Experience and Theory*, L. Foster and J. W. Swanson (eds.), (1970) Amherst, MA: University of Massachusetts Press, p 31.

⁶¹ Z.W Pylyshyn, “What the Mind’s Eye Tells the Mind’s Brain: A Critique of Mental Imagery,” (1973) *Psychological Bulletin*, 80: 1–25; “Mental Imagery: In search of a theory,” (2002) Vol 25 *Behavioral and Brain Sciences*, pp 157–182; *Seeing and Visualizing* (2003) Cambridge, MA: MIT Press.

⁶² n[12] p 71.

Finally, creative people are usually independent and self-motivated. An internal propulsion system drives them to do imaginative work. The stereotype of the “solitary genius” is strong in Csikszentmihalyi’s findings. He reasoned that, “After all, one must generally be alone in order to write, paint or do experiments in a laboratory.”⁶³ As the process of creation is not easy, creatives are also persistent. Despite the casual air that many creative people affect, most of them work late into the night and persist when less driven individuals would not.⁶⁴ However, creatives find it difficult to engage in meaningless work – they perform well only when inspired.⁶⁵ Whilst creatives are more likely to be uninhibited, they also have fragile egos.⁶⁶ Because they see their work as an extension of themselves, they are quite sensitive about their creative efforts – a ‘hot button’. When their work is critiqued or copied, part of the identity is wounded. We have already seen that a psychological response by creatives to being copied triggers an interest in IP law which provides remedies for unauthorized copying. In theory, this normal emotional reaction includes processing information about the infringement as well as coping emotionally and can be compared (although not equated to) to the psychological response to being burgled (having tangible property stolen). The charity Victim Support and home security specialist ADT surveyed 1000 victims of burglary and found that 37 per cent were more scared of falling victim to street robbery after being burgled.⁶⁷ This feeling of vulnerability can be transposed to creatives and their work when it is copied or used with permission.

According to Madahvi, IP rights must be understood as social and cultural relations, and not only understood as an incentive for creation.⁶⁸ This view could also apply to a need to understand IP rights through the lens of the psychological traits of creatives. In this vein, this research is the foundation that will underpin the design the NCIP project team created for its second IP awareness publication for creatives, *Intellectual Property Notebook: Displaying Your Creative Work*. The research has provided further insight as to how to raise IP awareness amongst the culture group that identify as creatives earlier in the IP Life Cycle, ideally during the creative process. It will be important to: (1) highlight the way in which IP rights protects creative’s ‘personality’ or ‘identity’ in terms of the provenance⁶⁹ of their creative work; and (2) provide examples as to how to protect IP rights before creative work is displayed or made available to the public; and finally, (3) assist creatives access IP enforcement mechanisms provided by the legal system to atone for the wound of infringement.

The primacy effect: introducing IP concepts to creatives

First impressions matter most. In other words, information we receive early in our observation of another discipline influences how we interpret and remember everything that follows. Handing creatives a black letter law IP law textbook is unlikely to engage highly visual people who typically possess a heightened aesthetic judgement and an

⁶³ n[12] p 65.

⁶⁴ n[12] p 62.

⁶⁵ www.onbeingcreative.com.

⁶⁶ n[12] p 73.

⁶⁷ ‘Burglary can damage mental health’ (19 June 2014) The British Psychological Society at <http://www.bps.org.uk/news/burglary-seriously-damages-mental-health>.

⁶⁸ M Sunder, ‘IP3’ (2006) Vol. 59 *Stanford Law Review* 257.

⁶⁹ Provenance (from the French *provenir*, “to come from”), is the chronology of the authorship, ownership, custody or location primarily of works of art. The main purpose of tracing the provenance of an object is to provide contextual and circumstantial evidence for its original creation, by establishing, as far as practicable, its later history, especially the sequences of its formal ownership, custody and places of storage. The practice has a particular value in helping authenticate creative works.

exceptional sense of form and beauty. Confirmation bias is a formidable foe and the last thing the NCIP wanted to do was confirm creatives' perception of law as a dull, dense and unpalatable topic.⁷⁰ When NCIP team members teach or design IP awareness materials, they 'present' the discipline of IP law. It is hoped that the creatives will be inspired to learn about the subject by feeling the keen interest that NCIP team members feel. However it is easy for law academics to slip into legalese that stupefies those untrained in law. If IP law knowledge is nearly incomprehensible, few creatives will bother learning it. Therefore to help creatives see not simply what they expect to see, it will be important for the NCIP team to go out of its way to design something attention-getting. Showing that law is of interest and useful to creatives will have to be convincing and hard for them to ignore to get past confirmation bias thinking. Although there is no single way to raise IP awareness, IP knowledge should be appropriate to the skills of the learner. The obvious way to enhance learning IP law is to bring as much as possible from the domain of the creatives and their social and cultural identity to the IP law experience.

THE FUTURE OF THE NCIP PROJECT

In conclusion, this interdisciplinary approach began with a desire to learn more about how creatives think and the personality traits of creatives. The aim of this paper was to make IP academics think about the cultural, social and psychological characteristics of 'creative identity' to enhance how they communicate the IP law framework and concepts to creatives, key stakeholders in the IP regime. This is why the NCIP project was originally developed and carried out the way it was and what will inform the team's conceptual design for the *Intellectual Property Notebook: Displaying Creative Work* publication which will differ from the earlier publication, *The Nottingham Intellectual Property Guide for Creatives* (2015).

Drawing on the new insight into the creative social, cultural and psychological identity, the new publication will be designed to emulate the 'sketchbook' concept to form a closer, deeper connection with creatives and their use of visual notetaking.⁷¹ It will also focus on the issue of the provenance in the art world. IP rights pertaining to art and design are time-limited or temporary. However, from the creative's point of view, the creative work will continue to exist in reality. For example, the painting, *The Girl with the Pearl Earring*, by 17th century Dutch artist Johannes Vermeer still hangs in the Mauritshuis in the Hague centuries after it was created and long after copyright expired. In the creative culture, provenance is still important to the community even after copyright ends. Whereas, copyright is about authorship, during the time period of protection the copyright work is a static entity in the eyes of the law.⁷² So too the rights of paternity, a statutory moral right afforded to creators which links creatives to their work.

The potential impact of the NCIP project and its publications outside academe will be to raise the level of IP awareness amongst entrepreneurial creatives. This will target their ability to identify the IP they own, assert paternity and seek advice to clarify their IP rights and in relation to infringement and enforcement issues. Further aims are to

⁷⁰ In psychology and cognitive science, confirmation bias (or confirmatory bias) is a tendency to search for or interpret information in a way that confirms one's preconceptions, leading to errors.

⁷¹ Mike Rodhe, *The Sketchnote Handbook: The Illustrated Guide to Visual Notetaking* (2012) Peachpit Press.

⁷² Andreas Rahmatian, *Concepts of Music and Copyright: How Music Perceives Itself and How Copyright Perceives Music* (2015) Edward Elgar Publishing, p 90.

increase in the number of IP rights registered as well as the financial value of the IP in creative entrepreneurial businesses. Quantitatively, the impact of the NCIP can be measured in terms of:

- (i) number of NCIP event participants;
- (ii) number of IP Health Checks carried out;
- (iii) number of appointments with the LAC;
- (iv) number of IP matter referrals to private specialist IP practitioners;
- (v) UKIPO design, trade mark and patent register searches to confirm if registered rights have indeed been registered by participants; and
- (vi) Companies House register searches to confirm if participants incorporated their businesses;
- (vii) analysis of such annual returns to establish commercial growth and profits derived by participant entrepreneurial creative businesses.

Qualitatively, the impact of NCIP will be measured by surveying participants and developing mini-case studies to depict how an increased awareness and knowledge of IP has helped participants through access to a bespoke IP Law Pro Bono Clinic run by the Nottingham Law School's Legal Advice Centre.

This article is the outcome of a number of initiatives that comprise the NCIP team's research to inform how it communicates IP law to creatives. The author has shared their thinking for the conceptualization and design process for the NCIP project's second publication targeting creatives, the *Intellectual Property Notebook* which will offer a complimentary mix of overarching IP education and individually specific suggestions for creatives. The NCIP project team has a passion for simple and useable solutions, translating complex IP law principles into relatable practical information. However, the NCIP project has also shown that the IP community has to rethink how it engages with creatives about IP law. What we sought to discover in this research was a deeper understanding of creativity and the social and psychological identity of creatives as a cultural group to inform our IP awareness aims. What we found was the top IP issues for creatives were visual thinking, addressing authorship to establish copyright and design right (provenance) and balancing creative identity and expression with a strategy for dealing with IP rights at each stage of the IP lifecycle for creatives. We know the 'creative personality' matters enormously to society, however mastering it is another issue. This article has set out what the NCIP has learned and refined, over the last 3 years. We are excited for the next stage of the transformation of IP awareness education for creatives.

HUMAN RIGHTS, LAW AND RELIGION: PERSPECTIVES ON THE ISLAMIC FACE VEIL

On 30 March 2015 Nottingham Law School's Centre for Conflict, Rights and Justice, and its Centre for Advocacy, co-hosted a seminar which explored some of the legal and human rights issues surrounding the Islamic face-veil – the *niqab* and the *burqa*. The event was generously supported by Cartwright King Solicitors and by Paragon Law Solicitors. Excellent papers were presented from a range of perspectives by members of the academy, the legal profession and wider civic society. Valuable and heart-felt interventions were contributed by other seminar participants.

The speakers who presented formal papers were: Dr Rajnaara Akhtar of the University of Warwick; the journalist and social commentator Yasmin Alibhai-Brown; Professor Eva Brems of the University of Ghent; Felicity Gerry QC, barrister and researcher at Charles Darwin University, Australia; Samantha Knights, barrister, Matrix Chambers; Jeremy Robson, Director of the Centre of Advocacy, Nottingham Law School; Professor Jill Marshall of University of Leicester; and Dr Anastasia Vakulenko of Birmingham University. Several of these speakers have kindly been able to provide written versions of their papers which are published in the pages that follow. Eva Brems and Jill Marshall's papers provide compelling analyses and critiques of the judgment of the Grand Chamber of the European Court of Human Rights in *SAS v France* in which it was held that the French ban on the face-veil in public space did not breach the right to manifest religion or belief under Article 9 of the European Convention since it was a proportionate means to ensure the state's aim of fostering *vivre ensemble* or 'living together'. Closer to home, Jeremy Robson and Felicity Gerry examine the issue of whether, and if so to what extent, the face-veil should be permitted during court proceedings in the United Kingdom, following the well publicised 2013 case at Blackfriars Crown Court – *R v D* – and the potential conflict between the right to manifest religion or belief and the administration of justice. More broadly, Samantha Knights provides a stimulating, and wide-ranging legal overview of the issue of the veil whilst, Yasmin Alibhai-Brown – in an extract from her 2014 book *Refusing the Veil* – powerfully makes the non-legal argument against veiling.

It is perhaps surprising that the issue of religious dress, and especially of *Islamic female* religious dress, and *especially* the Islamic face-veil has become one of the most controversial issues across modern Europe in recent years. Throughout most of the 20th century the idea that so much controversy could be generated by just a few square centimetres of cloth worn by a tiny minority of women would have seemed incredible. Today, however, against the backdrop of the 'immigration crisis', fears over religious radicalism and extremism, and doubts over multiculturalism, politicians seem never to pass up an opportunity to comment whenever a face-veil controversy hits the headlines, whether it be an MP complaining about veiled women in his constituency surgery, or veiled school girls in a Birmingham college, or a primary school teacher sacked for wearing the veil, or a defendant in a criminal trial wishing to give evidence whilst wearing the veil.

This is an issue that certainly provokes fierce debate between reasonable people. For some the Islamic face-veil is irredeemably a symbol of *subjugation*, associated with oppressive theocratic regimes where women are compelled, by law, to cover up when entering public space, on the pain of punishment. This compulsion is seen as either coming from religion itself, or from religious and/or patriarchal elites. The veil is seen as an insult to equality, and to freedom, and as a 'visible sign of separation' to quote the UK's former Foreign Secretary, Jack Straw MP.

For others, however, if a woman *chooses* to wear the veil, if she *chooses* to wear a garment intimately connected to her *faith* or her *identity* or her *culture*, who is anyone

else to tell her she should not wear it. In particular why should the coercive power of the state be used to punish her for, or prevent her from, wearing the veil; and how paradoxical for the organs of the state to *punish* a woman for wearing the veil in order to *free her from oppression*.

The face-veil poses a real dilemma for those who value human rights. In particular it poses real dilemmas for courts when they are called upon to adjudicate between a woman claiming the human right to manifest her religion through the clothes she wears, versus the state imposing restrictions for a host of reasons, like public safety, or preserving equality, or dignity, or freedom, or protecting the value of citizens' 'living together', or ensuring the fair administration of justice in the nation's courts.

It is surely the case that these difficulties have their roots deep in European history. Freedom of religion or belief in Europe has a long pedigree going back to the 16th and 17th centuries and bloody Wars of Religion in which competing branches of Christianity, having fought each other to the point of exhaustion, ultimately reached the pragmatic compromise: *toleration* – "I might not *like* or *respect* the religious other, but it is better to, however grudgingly, *put up with them* rather than suffer interminable sectarian conflict". On this view, the origins of freedom of religion or belief can be seen as a kind of proto-human right based on *pragmatic* grounds. This is certainly a rather negative basis for religious freedom; but it is also a very fragile one because, if the *end* we seek is social peace, there is always the possibility that this can be achieved *not* by toleration but by *suppression* of religious minorities.

The philosophers of the 18th century European Enlightenment gave us a more principled reason to protect human rights: – our equal moral worth as individuals, and our autonomy and dignity – our capacity to freely choose our paths through life from a plurality of competing options, including religious ones.

Now the interplay of these justifications – the *principled* grounds of autonomy, equality and dignity, and the *pragmatic* ground of toleration, combine to give the courts difficulties when it comes to the veil. Firstly – how is a court to deal with a woman who, *herself, claims the right* to wear the veil, who (in the eyes of opponents of the veil) *chooses* subjugation? There is perhaps a problem with the language and concept of autonomy and choice in this context. Perhaps this idea of autonomy misses the point of religiousness – it is often, maybe, not appropriate to talk of religion in terms of exercising choice between a variety of options. For many religious adherents their faith is not about exercising free choice between competing paths, but rather about obedience to the inner conscience, or to the will of God. Perhaps it is more appropriate to use sight-analogous terms: I don't so much *choose* a particular religious path, rather I *recognise it*, or *see or discover it* as the true way. The liberal discourse of human rights, however, leads all participants in the debate to use the language and mind-set of autonomy and perhaps this doesn't quite capture what, for many, religious faith and manifestation is all about

Secondly, Europe's religiously inspired conflicts have led to a plethora of delicate compromises that European states have reached to ensure social peace in their diverse societies involving such principles as: secularism, neutrality, *laïcité*, and constitutional rights Courts, especially an international court like the European Court of Human Rights, meddle with such tortuously reached national settlements at their peril. The result of all this uncertainty about how the veil relates to autonomy and dignity, coupled with an unwillingness to meddle with national settlements leads to the European Court to grant a wide margin of appreciation to states, so that judicial scrutiny of restrictions on religious dress is often at a bare minimum.

This tension is perhaps inevitable. However, from the perspective of a woman who does wear the face-veil as a matter free choice, or who freely accepts what she sees as a religious duty or obligation to veil as a way of 'getting closer to God' it might be reasonable for her to ask: "I thought these 'universal human rights' applied equally to everyone; but how do they protect *me*?"

Perhaps one way forward is for us to all to be willing to take the mental step of taking other people's perspectives, and for us all to ask the question: "If *I* believed what *you* believe, how would *I* like it if someone did *that* to *me*?" I hope that, in a small way, the seminar and the papers herein, contribute, in some small way, to this process.

Tom Lewis, Director of the NLS Centre for Conflict, Rights and Justice

SAS v FRANCE: A REALITY CHECK

EVA BREMS*

INTRODUCTION

In the debate on ‘burqa bans’ in Europe, the Grand Chamber judgment of *SAS v France* of the European Court of Human Rights has become a central reference point. The judgment, which dates from 1 July 2014, has been the subject of a great number of comments, from scholars as well as human rights organizations. The large majority of these comments have criticized the judgment, finding it deficient in the light of the author’s theory or understanding of minority protection, religious freedom, gender equality, individual autonomy, social cohesion or multicultural tolerance.¹ The current contribution provides another critical comment of *SAS*. This paper will attempt to examine the judgment from the perspective of the persons who are most directly affected by it, i.e. women who wear or wish to wear a face veil in Europe, yet who live in a place where a face covering ban is in effect. Today, nationwide face covering bans exist in France² and Belgium.³ In addition, a regional ban was adopted in the Swiss

*Professor of Human Rights Law, Ghent University.

¹ See amongst others John Adenitire, ‘Case Comment SAS V France: Fidelity to Law and Conscience’ [2015] EHRLR 78; Stephanie Berry ‘SAS v France: Does Anything Remain of the Right to Manifest Religion?’ (*EJIL Talk*, 2 July 2014) <<http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>> accessed 21 December 2015; Susan M Edwards, ‘No Burqa’s We’re French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling’, [2014] Denning Law Journal 246; Erica Howard, ‘S.A.S. v France: Living Together or Increased Social Division?’ (*EJIL Talk*, 7 July 2014) <<http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/>> accessed 21 December 2015; Shino Ibold, ‘Bei Burka und Nikab hört die Toleranz auf – Kritische Anmerkungen zum Urteil S.A.S. v. France des EGMR vom 1. Juli 2014’ [2015] Kritische Justiz, 83; Jill Marshall, ‘S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities’ [2015] HRLR, 377; Ronan McCrea, ‘The French Ban On Public Face-Veiling: Enlarging The Margin Of Appreciation’ (*EU Law analysis*, 2 July 2014) <<http://eulawanalysis.blogspot.be/2014/07/the-french-ban-on-public-face-veiling.html>> accessed 21 December 2015; François-Xavier Millet, ‘When the European Court Of Human Rights Encounters The Face; A Case-Note On The Burqa Ban In France’, [2015] EuConst 408; Mark L Movsesian, ‘European Human Rights Court to France: Do Whatever You Want’, (*First Things*, 3 July 2014) <<http://www.firstthings.com/blogs/firstthoughts/2014/07/european-human-rights-court-to-france-do-whatever-you-want>> accessed 21 December 2015; Saïla Ouald Chaib and Lourdes Peroni, ‘S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil’ (*Strasbourg Observers*, 3 July 2014) <<http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/>> accessed 21 December 2015; Ilana Ruggiu, ‘S.A.S. vs France. Strasbourg conferma il divieto francese al burqa con l’argomento del “vivere insieme”’ (*Forum Costituzionale*, 12 September 2014) <<http://www.forumcostituzionale.it/>> accessed 21 December 2015; Teresa Sanader, ‘S.A.S. v France – the French principle of “living together” and the limits of individual human rights’, (*LSE Human Rights*, 14 July 2014) <<http://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france>> accessed 21 December 2015; Singh, Hardik ‘Case Analysis of S.A.S. v France’, [2015] NLUJ Law Review 168; Ioanna Tourkochoriti, ‘The Burka Ban before the European Court of Human Rights: A Comment on S.A.S. v. France’ (*J-COINnect*, 9 July 2014) <<http://www.iconnectblog.com/2014/07/the-burka-ban-before-the-european-court-of-human-rights-a-comment-on-s-a-s-v-france>> accessed 21 December 2015; Lucy Vickers, ‘S.A.S. v France: The French Burqa Ban and Religious Freedom’ (*E-international relations*, 10 September 2014) <<http://www.e-ir.info/2014/09/10/sas-v-france-the-french-burqa-ban-and-religious-freedom>> accessed 21 December 2015; Martin Wählich, ‘ECHR Chamber Judgment (Sic) Case Of S.A.S. V. France: Banning Of Burqas And Niqabs Legal?’ (*CJIL blog*, 21 September 2014) <<http://cjl.org.uk/2014/07/21/echr-chamber-judgment-case-s-s-v-france-banning-burqas-niqabs-legal/>> accessed 21 December 2015; Hakeem Yusuf, ‘S.A.S. v France: Supporting ‘Living Together’ or Forced Assimilation’ [2014] IHLR 277.

² Act n° 2010–1192 of October 11, 2010 prohibiting the concealment of the face in public came into force on April 11, 2011. It states: ‘No one may, in spaces open to the public, wear a garment that has the effect of hiding the face’ (art. 1). Exceptions apply when ‘clothing [is] prescribed or authorised by legal or regulatory provisions’, when the clothing ‘is justified by reasons of health or professional motives’, or when the clothing is ‘part of sports activities, festivities or artistic or traditional manifestations’ (art. 2, II). Sanctions consist in fines for the wearer of up to 150 euro, and/or participation in a citizenship course. Additionally, the Act penalises anyone who forces another ‘through threats, violence, constraint, abuse of authority or power for reason of their gender’ to wear face coverings, with a fine of 30,000 euro and one year imprisonment. The latter penalties can be doubled if the victim is a minor. On October 7, 2010, the Constitutional Council upheld the constitutionality of the ban, with only minor reservations. Most notably the Council determined that the ban could not be enforced in places of worship (Constitutional Council, Oct. 7, 2010, no. 2010–613 DC, para 5).

³ The Act of June 1, 2011 ‘to institute a prohibition on wearing clothing that covers the face, or a large part of it’ (Belgian Official Journal, July 13, 2011) entered into force on July 23, 2011. It inserts an Article 563bis into the Belgian Criminal Code. In practical terms and ‘subject to legal provisions to the contrary’, this provision punishes persons ‘who appear in places accessible to the public with their faces covered or concealed, in whole or in part, in such a manner that they are not recognisable’ with a monetary fine of EUR 15 to EUR 25 (Increased with the legal surcharge factor, i.e. multiplied

canton of Ticino and municipal bans are in place in municipalities in the Netherlands, Spain and Italy.⁴ Currently, two applications challenging the Belgian face covering ban are pending before the European Court of Human Rights.⁵ While it is not completely excluded that the European Court might distinguish these cases from *SAS* (see *infra*), there is no doubt that currently, the Grand Chamber judgment of *SAS* provides legal and political shelter to all existing face covering bans across Europe, as well as to any that might still be in the pipeline.⁶

The paper will draw on empirical research based on interviews with women who wear/wore a face veil in Belgium and France. It will rely most heavily on the interviews undertaken in Belgium by the author's own research team. This consists of 27 interviews conducted between September 2010 and September 2011 and 2 focus group discussions in April and May 2012.⁷ About half of the women were interviewed before the introduction of the nationwide ban, and half after. It should however be born in mind that in Belgium, the nationwide ban was preceded by municipal bans, with which nearly all of these women had been confronted. Information from the analysis of the Belgian interviews will be complemented by the findings of similar research that was undertaken in France by Open Society Foundations. This consists of two studies. The first study, that was undertaken before the entry into force of the French ban, consists of 32 interviews conducted between October 2010 and January 2011, mainly in Paris, Lyon, Avignon and Marseille.⁸ The follow-up study is based on interviews conducted in August-September 2013 with 35 women, 14 of which were also interviewed in the first study.⁹ This study was particularly aimed at documenting the effects of the ban on the lives of these women.

In other publications, I have confronted the findings from this empirical research with the motivations underlying the adoption of the Belgian and French face covering bans, as stated in the parliamentary *travaux préparatoires*,¹⁰ and with the reasoning of

by 5.5) and/or a prison sentence of one to seven days. An exception applies when face covering is permitted or imposed by 'labour regulations or municipal ordinances due to festivities'. The law moreover enables continued application of local bans imposing administrative sanctions in this field. In Belgium too, the law was unsuccessfully challenged before the Constitutional Court, which, like the French Constitutional Council made only a minor reservation for places of worship (Belgian Constitutional Court, Dec. 6, 2012, no. 145/2012).

⁴ Municipal bans preceded the nationwide ban in Belgium and remain in place. The 'geographical coverage' of these local prohibitions appears to be wider in Belgium than in other countries, with virtually all major cities and towns disposing of a prohibition, which is regularly enforced (and continues to be enforced despite the nationwide ban, presumably on account of the lighter procedure of administrative sanctions). In the Netherlands such local bans are quite rare. As the legality and constitutionality is widely considered controversial, they hardly seem to be enforced in practice. In Italy, local bans can be found particularly in the north and northeast of the country. In Spain, a relatively small number of towns and cities in Catalonia (including, most notably, Barcelona), started as of 2010 to pass regulation banning face covering in municipal buildings.

⁵ *Belkacemi and Oussar v Belgium* App no 37798/13 and *Dakir v Belgium* App no 4619/12.

⁶ Legislative proposals for a face covering ban have been on the agenda in the Netherlands, Denmark, Italy, the United Kingdom, Spain and Switzerland. For an example of a comment assuming that the *SAS* judgment opens the door for more face covering bans, see David Fernandez Rojo, 'Has the European Court of Human Rights Opened the Door to a General Prohibition of the Full-Face Veil in Spain?' (*Erasmus School of Law, Department of International and European Union Law*, 15 June 2014) <<http://blog.eur.nl/esl/ieul/2015/06/15/has-the-european-court-of-human-rights-opened-the-door-to-a-general-prohibition-of-the-full-face-veil-in-spain>> accessed 22 December 2015.

⁷ For more information, see Brems, Janssens, Lecoyer, Ouald Chaib & Vandersteen, *Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering* <<http://www.ugent.hrc.be>> accessed 21 December 2015.

⁸ Open Society Justice Foundations, *Unveiling the Truth: Why 32 Women Wear the Full-Face Veil in France* <<https://www.opensocietyfoundations.org/reports/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france>> accessed 21 December 2015.

⁹ Open Society Justice Initiative, *After the Ban: the Experiences of 35 Women of the Full-Face Veil in France* <<https://www.opensocietyfoundations.org/litigation/sas-v-france>> accessed 21 December 2015.

¹⁰ Brems, Janssens, Lecoyer, Ouald Chaib, Vandersteen and Vrielink, 'The Belgian "Burqa Ban" Confronted With Insider Realities', in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (CUP 2014) 77; Saïla Ouald Chaib and Eva Brems, 'Doing Minority Justice Through Procedural Fairness: Face Veil Bans In Europe' [2013] *Journal of Muslims in Europe* 1.

the Belgian Constitutional Court,¹¹ and have argued why it would be important for the European Court of Human Rights to take such findings into account in its ruling in *SAS*.¹² This project of a mediated dialogue between face veil wearers and those who decide on their right to cover their face, would not be complete without the final stage, i.e. a confrontation of the face veil wearers' realities with the reasoning of the Grand Chamber, that had the final say in the face covering saga. Such confrontation is the main purpose of the present paper. In addition, the final section of the paper will look ahead and speculate about whether the Court might use the opportunity of the pending Belgian cases to clarify or adjust some of its discourse in *SAS*.

A BRIEF PRESENTATION OF THE CASE

The applicant in *S.A.S.* is a French citizen born in Pakistan,¹³ living in the Paris region. She is a law graduate, who did an internship with the law firm in Birmingham with whom she submitted the application.¹⁴ She states that before the ban, she used to wear the face veil on a regular basis since she was 18 years old:

Gradually, I wore my full face veil whenever I passed through public areas, travelled on public transport or visited public buildings (generally three times a week). . . . Of course, for instance, I would take off my veil if I needed to visit the doctor or keep an official appointment.¹⁵

As she submitted the application on the day of the ban's entry into force, she does not claim to have been stopped by the police or fined. In a witness statement submitted two years later, she states however that:

as a result of the implementation of Loi no. 2010–1192 I now live under the threat of both state prosecution and public persecution. As a result of the implementation of Loi no. 2010–1192 I am now vilified and attacked on the streets of the Republic I love, effectively reduced to house arrest, virtually ostracized from public life and marginalized.¹⁶

She adds:

criminalisation, or rather the political scaremongering that preceded it, has incited members of the public to now openly abuse and attack me whenever I drive¹⁷ wearing my veil. Pedestrians and other drivers routinely now spit on my car and shout sexual obscenities and religious bigotry. Consequently, I now feel like a prisoner in my own Republic, as I no longer feel able to leave my house unless it is essential. I leave the house less frequently as

¹¹ Eva Brems and Laurens Lavrysen, 'Redding boerkaverbod leidt tot rare kronkels' [2013] *Recht, Religie & Samenleving* 131.

¹² Eva Brems, 'Face Veil Bans in the European Court of Human Rights: The Importance Of Empirical Findings', [2014] *Journal of Law and Policy* 517. See also the third party intervention of the Human Rights Centre at Ghent University in *SAS v France* available at <<http://www.hrc.ugent.be/third-party-interventions-before-ecthr>> accessed 21 December 2015.

¹³ Witness statement of the applicant, annex 1 to *S.A.S.* final observations dated July 4, 2013, paras. 1 and 2.

¹⁴ *Ibid* para 15.

¹⁵ *Ibid* paras 22–23. This is a correction to the statement in the application that 'The Applicant does not wear the niqab in public places at all times. . . . As to when the Applicant chooses to wear the niqab in the public place depends very much on her introspective mood, spiritual feelings and whether she wishes to focus on religious matters (*S.A.S.* application to the European Court of Human Rights dated April 11, 2011, para 3).

¹⁶ *Ibid* para 6.

¹⁷ A car on a public road is not considered to be part of the 'public space' under the French ban, as per an interpretative circular: Circulaire du 2 mars 2011 relative à la mise en œuvre de la loi n° 2010–1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, JORF n°0052 March 3, 2011, 4128.

a result. I wear my veil with even less frequency when out in public as a result. Indeed, I also feel immense guilt that I am forced to no longer remain faithful to my core religious values.¹⁸

Fear of harassment also motivated the applicant's request for anonymity,¹⁹ which was granted by the Court. The applicant in *S.A.S.* alleged that the French ban on face covering in public violated articles 3, 8, 9, 10, 11 and 14 of the ECHR. The Court however examined the case only under articles 8 and 9 (together), and briefly under article 14 in conjunction with articles 8 and 9.²⁰

The French government had advanced three 'legitimate aims' to justify the face covering ban as a justifiable rights-restrictive measure: the protection of public safety, respect for 'compliance with the minimal requirements of life in society', and 'equality between men and women and respect for the dignity of the person'.²¹ The Court ruled on 1 July 2014 with a large majority of fifteen votes to two that there was no violation. From among the three grounds that were advanced by the French state to justify the ban, the Court dismissed two, namely the argument of safety and the argument of gender equality. Yet the Court upheld the justification based on the 'minimal requirements of life in society' which it rephrased as the novel concept of 'living together'.

THE NEED FOR A REALITY CHECK

A striking feature of the law making process around this issue in France as well as Belgium, was the absence of any interest in the actual women concerned. At the time the bans in Belgium and France were adopted, no empirical research was available that would document the experiences and motives of face veil wearing women in those countries. Nor was any effort undertaken to consult those women in the process leading up to the ban. In France, the adoption of the ban was preceded by the work of a Parliamentary Commission of Inquiry. The Commission of inquiry consisted of 32 members, representing all parliamentary groups. It heard around 200 witnesses and experts, and it sent out questionnaires to several French Embassies. After six months, it produced a 658-page report.²² It had not planned to hear a single woman wearing a face veil. In the end it heard one face veil wearer, Kenza Drider, upon her own request. In the Belgian parliament, a large majority rejected a request for expert hearings.

I submit that it is always relevant and important for the European Court of Human Rights (ECHR) to take the perspective of the rights holders into account when ruling on an alleged human rights violation. Yet this is absolutely vital in a situation such as the face covering ban, in which the national authorities have omitted to account for that perspective to any satisfactory degree. As I have argued elsewhere, accounting for the empirical reality concerning face veil wearers in Europe is crucial for an adequate legal analysis of the human rights dimensions of face veil bans.²³ It is moreover essential

¹⁸ Witness statement of the applicant, annex 1 to *S.A.S.* final observations dated July 4, 2013, para 26.

¹⁹ *S.A.S.* application to the ECtHR dated April 11, 2011, para 1.

²⁰ The Court dismissed the arguments based on article 3 alone and in conjunction with article 14, and on article 11 alone and in conjunction with article 14 as inadmissible for being manifestly ill-founded. The argument based on article 10 was found admissible, yet the Court held that 'no issue arises under Article 10 of the Convention, taken separately or together with Article 14 of the Convention, that is separate from those that it has examined under Articles 8 and 9 of the Convention, taken separately and together with Article 14 of the Convention' (*SAS v France*, para 163).

²¹ French Government submissions in *S.A.S.* case, July 31, 2013, para 94.

²² A Gérin, *Rapport d'information fait en application de l'article 145 du règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national*, Assemblée Nationale no 2262 (January 26, 2010).

²³ Brems (n12).

from the perspective of procedural fairness, aimed at furthering social cohesion and preventing the alienation of minorities.²⁴

In what follows, the Court's treatment of three justificatory arguments of the French government will be examined one by one, and confronted with the findings of the empirical research among face veil wearers.

THE GENDER EQUALITY ARGUMENT

Several types of gender equality arguments have been made in support of the face covering bans. In the *SAS* judgment, the Court addressed two types of arguments directly, rejecting them, and one indirectly, dismissing it as irrelevant to the case.

The assumption of male pressure denied

In the discussions leading up to the face covering bans in France and Belgium, it was widely assumed that most, if not all, women wearing an Islamic face veil do so because they are forced or pressurized by husbands or other men in their families to cover their face.²⁵ All available empirical research on face veil wearers in Europe points out that this is not the case, and that in fact the very large majority of European face veil wearers make an individual autonomous choice to do so.²⁶ My experience in presenting the results of such research to different audiences in Belgium shows that people find it very hard to believe these empirical findings, a fact that testifies to the tenacious character of this assumption. For the ECtHR, this issue was not directly relevant, as the Court was confronted with an applicant who was claiming her right to cover her face, and as there was no reason to doubt that she was exercising an autonomous choice. Indirectly however, the fact that the widespread assumption about pressure and force in the matter of the face veil was also one of the assumptions underlying the adoption of the face veil ban, is relevant, as it may clarify some of the other apparent assumptions of the legislator, for example concerning the degree of social participation of veiled women. Once it is assumed that this is a category of women who are strongly oppressed by men in their families, to the point of being forced to cover their face, one is arguably not very likely to picture these women as eager or even just ordinary participants in every-day social life. On the other hand, if one knows how difficult it is for a woman in France or Belgium to take the decision to start to wear a face veil and to continue to do so, in light of the massive aggressive response she will encounter in the public sphere,²⁷ and the likelihood of negative reactions in the immediate environment,²⁸ one is more inclined to picture this category of women as strong and determined individuals. That is how they see themselves and each other.²⁹ Moreover, the assumption of force/pressure is also relevant as evidence of a very problematic attitude among the promoters of the ban: after all, the persons who supposedly are suffering such a high degree of oppression (which should be characterized as domestic violence) are treated by the law as

²⁴ Ouald Chaib and Brems (n 10).

²⁵ E.g. according to Millet (n1) 416, 'this view is so widespread in public discussion that it is the main argument raised by those who oppose the full-face veil'.

²⁶ All interviewees in France and Belgium describe the decision to start wearing the face veil as a well-considered and free decision, a personal trajectory of deepening and perfecting one's faith. See OSJF (n8) 15; Brems, et al. (n7) 5.

²⁷ In France and in Belgium, nearly all face veil wearers experienced frequent expressions of hatred and aggression in the public sphere. OSJF (n8) 16; Brems et al. (n7) 17.

²⁸ In France and Belgium, nearly all face veil wearers were faced with strong negative reactions from their relatives and friends, sometimes even their husbands. OSJF (n8) 15; Brems, et al. (n7) 8.

²⁹ Brems, et al. (n7) 23.

perpetrators of a crime. This may be relevant even in the context of a case brought by an applicant who does not claim to have suffered force or pressure, as it suggests a hostile attitude toward these women, which may be linked to evidence of islamophobia in the broader society.

The Court however, curiously chose to deny that assumptions of force/pressure played any significant role leading up to the French ban, stating

The Court would first emphasise that the argument . . . , to the effect that the ban . . . was based on the erroneous supposition that the women concerned wore the full-face veil under duress, is not pertinent. It can be seen clearly from the explanatory memorandum accompanying the Bill . . . that it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.³⁰

This is a puzzling paragraph. The legislative history of the French ban consists of hundreds of pages, including in particular the report of the Parliamentary Commission of Inquiry. During these debates, the idea that women are forced by men in their environment to cover their face was a running theme. For that reason, the French law includes a specific provision providing sanctions for persons who force others to cover their face.³¹ It is hard to understand why the European Court would deny this by narrowly looking only at the explanatory memorandum that was strategically tailored to what the French government, after seeking legal advice, considered to be their strongest argument. So the Court chose to rewrite history, reinterpreting the intentions of the French legislator in this respect.

As a result, one type of gender equality argument that has been mobilized to justify a face covering ban, i.e. the argument based on the protection of women's autonomy, was not addressed by the Court. It should be clear that this argument is meaningless to the extent that the face veil is chosen freely. Moreover, research in France shows that the ban has made married women who are strongly attached to the veil more dependent on their husbands, as they go out much less.³² So it is clear that the gender equality argument that motivated the face covering ban is not about empowering women in the private sphere to guarantee the exercise of free choice. And indeed the enforcement of the law appears limited to arresting and fining women. There is no indication, nor even a claim by the French or Belgian government, that this would be accompanied by an approach that offers help or support to these women.

Dismissing other gender equality arguments

The gender equality arguments that were addressed by the Court, concern two other issues: paternalistic protection against harmful choices, and banning harmful symbols. The first argument concerns the idea that, even if women freely choose to wear a face veil, a ban is justified because these women should be protected against a choice that is harmful for themselves. The French government submitted in the *SAS* case that:

it was a matter of respect for human dignity, since the women who wore such clothing were therefore “effaced” from public space. In the Government’s view, whether such “effacement” was desired or suffered, it was necessarily dehumanising and could hardly be regarded as consistent with human dignity.³³

The European Court refused to go along with such far-reaching paternalism:

³⁰ *SAS v France*, para 137.

³¹ The Belgian law however does not contain such a provision.

³² OSJF (n9) 3.

³³ *SAS v France*, para 82.

a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in (the Convention), unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.³⁴

The second argument is based on the idea that the face veil should be banned as a symbol of women's subordination. In this line of reasoning, the face veil does not necessarily harm those who wear it, but rather those who are confronted with it. The report of the Parliamentary Commission of Inquiry found that 'the full-face veil was an infringement of the principle of liberty, because it was a symbol of a form of subservience and, by its very existence, negated both the principle of gender equality and that of the equal dignity of human beings'.³⁵ The explanatory memorandum of the face covering bill added:

it is not only about the dignity of the individual who is confined in this manner, but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual.³⁶

The empirical findings reveal that this is a strictly outsider interpretation of the face veil as a symbol or even a message, which is squarely at odds with the intentions and experiences of face veil wearers. Most outsider readings see the face veil as a message to the world saying 'women should cover themselves', or even 'women should be submitted to men'. For the women under the veil however, the veil is not a message to the outside world. It is a very personal choice they make for themselves in their relationship to God. Proselytizing is very far from these women's minds. If there has to be a message, it is certainly not a normative one. Also, if there has to be a message, it would not be about gender relations, but about religion. The message might read 'I am a very pious woman'. If the face veil has to be a symbol, for the face veil wearer that would be a symbol of religious devotion. At most, it could be called a symbol of chastity. But from chastity to gender inequality is a long stretch. Interestingly, the ECtHR refused to go along with symbolism as an outsider construct. Indeed it referred to the insider perspective of the face veil wearers, as well as to the need for an empirical ground for the claim that the face veil is a discriminatory symbol, when it stated that:

it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.³⁷

Rather than accepting outsider interpretations of the face veil as a harmful symbol, the Court thus referred to the intention of the wearers. In my opinion, the Court is to be applauded for critically assessing the French government's claims by changing the perspective from outsider to insider. Even if the Court did not keep up this laudable attitude when examining the 'living together' argument (cf. *infra*), this new and sophisticated approach to gender equality stands as an important precedent that may usefully be applied also to other contexts.³⁸

³⁴ *Ibid* para 119.

³⁵ *Ibid* para 17.

³⁶ *Ibid* para 25.

³⁷ *Ibid* para 120.

³⁸ Not all feminists agree with this analysis. For a position that thinks the ban should have been upheld on grounds of gender equality, see Raday, Frances 'Comments on SAS v France' (Oxford Human Rights Hub, 19 July 2014) <<http://ohrh.law.ox.ac.uk/professor-frances-raday-comments-on-sas-v-france>> accessed 21 December 2015.

The Court in *SAS* has thus rejected gender equality as a legitimate aim for the restriction of the applicant's fundamental rights. It has also rejected human dignity as a legitimate aim, stating that it:

is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy.³⁹

The rejection of both gender equality and human dignity as plausible legitimate aims in this context is the more remarkable as it is common practice for the Court to easily accept that any legitimate aims that are invoked by the government, fit into the categories listed in the limitation clauses of the relevant Convention provisions. This selective attitude was however not consistently applied, as the 'living together' argument (*cf. infra*), which is even harder to fit into such categories, did pass the Court's scrutiny. This is especially troubling in light of the hypothesis that the essence of the argument on symbolic gender equality and on human dignity has been integrated into the argument on 'living together' (*cf. infra*), and in that guise has passed the Court's scrutiny, resulting in a judgment that, despite this fine gender analysis, is 'bad news for women'⁴⁰.

THE SAFETY ARGUMENT

The French government also invoked a safety argument in support of the ban. This argument has recently become prominent outside Europe, as it is the justification for face veil bans in several African countries (notably Chad, Cameroon and Senegal), that either have been confronted with Islamist terrorists smuggling weapons under Islamic clothes and disguising their identity with a face veil or feared that this might happen.⁴¹ Yet in Europe, where face veil wearers stand out in a crowd, no direct link between the face veil and safety threats has yet been established. In Italy, a general ban on face covering is in place that was aimed at balaclava-clad terrorists in the 1970s; yet when local authorities attempted to use this as a basis for local face covering bans, the Council of State did not accept this.⁴²

Before the European Court, the safety argument passed the 'legitimate aim' test, but failed in the scrutiny of proportionality. The Court stated that:

in view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. . . . the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud.⁴³

³⁹ *SAS v France*, para 120.

⁴⁰ Louise Roug, 'Why France's Ban on Face Veils is Bad News for Women', (Mashable, 2 July 2014) <<http://mashable.com/2014/07/01/french-ban-veils-op-ed/#06A7FCnJskqU>> accessed 21 December 2015.

⁴¹ Ludovica Iaccino, 'Boko Haram: African Countries that Banned Burqas Fearing their use by Terrorists' (*International Business Times*, 19 November 2015) <<http://www.ibtimes.co.uk/boko-haram-african-countries-that-banned-burqas-fearing-their-use-by-terrorists-1529552>> accessed 21 December 2015.

⁴² Mathias Möschel, 'La Burqa En Italie: D'une Politique Locale À Une Legislation Nationale', in David Koussens and Olivier Roy, (eds), *Quand la burqa passe à l'ouest; Enjeux éthiques, politiques et juridiques* (Presses Universitaires de Rennes, 2014) 239.

⁴³ *SAS v France*, para 139.

It is relevant to add that the empirical research both in France and in Belgium has shown a general willingness among women who wear a face veil to uncover their faces for identification purposes when requested to do so by an official. The very large majority are prepared to do so regardless of the gender of that official. Only a small minority of women stated that the official would have to be female.⁴⁴

It is worth mentioning that the analysis of the debates leading up to the face veil ban in France as well as in Belgium reveals that the safety argument was made not only as an argument of objective safety, but also as one of subjective safety. It was stated that the sight of a face veil engenders feelings of unsafety among the majority population. In the French context however, these concerns were integrated into the argument on 'living together'⁴⁵ (*cf. infra*), and in that guise have passed the Court's scrutiny.

THE FACE VEIL AND 'LIVING TOGETHER'

After dismissing the arguments supporting the ban on grounds of gender equality, human dignity and safety, the Court ultimately upheld the ban as a proportionate measure within the state's margin of appreciation for the protection of 'living together' in society. In the French debates, the concept of 'le vivre-ensemble' was strongly linked to the Republican principle of '*fraternité*' (brotherhood).⁴⁶ The Report of the Parliamentary Commission of Inquiry stated that the face veil "represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of living together".⁴⁷ Both the Court's acceptance of 'living together' as a legitimate aim that may justify the restriction of Convention rights, and the Court's finding that the blanket ban was justified as a proportionate measure for the protection of 'living together', have rightly been the focus of the bulk of the criticism of the *SAS* judgment. Commentators have expressed concern about the vagueness of this notion, which in combination with the granting of a wide margin of appreciation to national authorities, creates a risk of abuse. This risk has been associated in particular with 'forced assimilationist policies against minorities',⁴⁸ 'fundamentalist secularism',⁴⁹ rubberstamping xenophobia,⁵⁰ enshrining 'ethno-cultural and gender hierarchies',⁵¹ and 'accepting an omnipotent state'.⁵²

Nevertheless, all things considered it is in my opinion appropriate that the central part of the discussion about the face veil should turn around this criterion, as it is the vehicle that expresses most closely the actual reasons why many people want the face veil banned. This is their experience of a profound unease when they are confronted

⁴⁴ Brems, Eva et al. (n10) 103 and OSJF (n8) 45.

⁴⁵ Eva Brems, Joghchum Vrielink, and Saïla Ouald Chaib, 'Uncovering French and Belgian Face Covering Bans', [2013] Journal of Law, Religion and State 83.

⁴⁶ Many commentators have stated that the face veil ban risks instead polarizing society. See for example Erica Howard (n 1). Ilana Ruggiu (n1) argues that the argument of 'living together' works against brotherhood, and endorses instead its opposite: fear of one's brother, or rather of one's sister (especially if she is a foreigner who dresses differently from us).

⁴⁷ *SAS v France*, para 17.

⁴⁸ Yusuf (n 1).

⁴⁹ Sanader (n 1).

⁵⁰ 'S.A.S. v France: Banned Burqas and Veiled Intentions Supported at the Strasbourg Court', on (Life, Law & Other Things, 3 August 2014) <<https://lifelawandotherthings.wordpress.com/2014/08/03/s-a-s-v-france-banned-burqas-and-veiled-intentions-supported-at-the-strasbourg-court>> accessed 21 December 2015. See also Singh (n1) 175.

⁵¹ Eoin Daly, 'Fraternalism as a limitation on religious freedom: the case of S.A.S. v France' <https://www.academia.edu/11849717/Fraternalism_as_a_limitation_on_religious_freedom_the_case_of_S.A.S._v_France> accessed 21 December 2015.

⁵² Tourkochoriti (n1).

with a woman wearing a face veil, and even at the simple thought of such a woman. In my personal experience of the face veil debates in Belgium,⁵³ people who are pressed to describe the nature of that unease, will frequently express themselves in terms that echo themes of subjective safety, human dignity and symbolic gender equality.⁵⁴

The Court summarizes the French government's arguments with respect to 'living together' as follows:

In the Government's submission, the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one's shared humanity with the interlocutor, at the same time as one's otherness. The effect of concealing one's face in public places is to break the social tie and to manifest a refusal of the principle of "living together" (*le "vivre ensemble"*).⁵⁵

This is a curious combination of concrete behavioural concerns (the role of the face in human interaction) and a highly theoretical perspective. Likewise, in the political debates leading up to the bans in France and Belgium, one can find both a concrete and a philosophical version of this theme. The concrete behavioural version is about the idea that women who wear a face veil, by that fact signal their withdrawal from or unavailability for social interaction – which is considered undesirable.

Empirical research does not confirm this assumption. Within their familiar environment, especially before the ban, face veil wearers participated in a range of social activities involving contact with others at schools (picking up children), in shops, administrative offices etc. What appears from the empirical research is that others experience thresholds to seek contact with women who cover their face with a veil. But there does not appear to be a pattern of withdrawal from everyday social life – at least not before the ban.⁵⁶

The philosophical version of this argument received the most emphasis in the French government's submission before the ECtHR. In the French debates surrounding the face covering ban, seeing the face of others has been put forward as a moral right, based on the work of the French sociologist Elisabeth Badinter, who was interviewed by the parliamentary Commission of Inquiry, and of the French philosopher Emmanuel Levinas.⁵⁷ The latter's discourse about the 'face of the other' as the basis for meeting another person and being ethically involved was interpreted literally. Some commentators have argued that this is a misunderstanding of the work of Levinas, which put strong emphasis on respect for the other.⁵⁸ In any case, even if Levinas meant this literally, it is a huge step from a postmodern philosophical argument to a criminal prohibition. Yet the European Court followed the French government in taking that step.

First, the Court had to decide whether 'living together' could even be considered as a valid aim that might in principle justify a restriction of Convention rights. In that respect, the Court stated:

The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would

⁵³ I participated intensely in this debate, in multiple capacities: as a teacher, as an academic expert, as a president of the Belgian section of Amnesty International (until 2010), and as a Member of Parliament (2010–2014).

⁵⁴ Cf. the argument of Shino Bold (n1) 92, that everything points toward the conclusion that the argument of gender equality stands in fact behind the argument of 'living together'.

⁵⁵ *SAS v France*, para 82.

⁵⁶ OSJF (n8) 13 and 44; Brems et al. (n7) 11.

⁵⁷ Gérin (n22) 117–118.

⁵⁸ Chloé Patton 'Defacing Levinas: Vision, Veiling and the Ethics of Republican Citizenship in France', [2014] *Social Identities* 186.

fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.⁵⁹

This is a cautious start. At this stage, the Court did not appropriate the ‘living together’ discourse as its own, using expressions as ‘can understand the view’, and ‘is perceived by the State’. Most importantly, it announced a careful examination of the necessity of rights-restrictive measures taken in the name of ‘living together’.

Doing this, the Court examined separately the relevance of the ban for ‘living together’ and its proportionality.⁶⁰ On relevance, the Court stated that “it falls within the powers of the state to secure the conditions whereby individuals can live together in their diversity”.⁶¹ There can be no objection to that statement. The Court went on by accepting that a state may in this context emphasize in particular the interaction between individuals “and may consider this to be adversely affected by the fact that some conceal their faces in public places”.⁶² And then it went on to examine the proportionality of the ban (cf. *infra*). At this point in the reasoning, the absence of empirical grounding starts to stand out. As the discussion concerns behaviour that a society chooses to criminalize, one may legitimately expect the link between that behaviour and its alleged undesirable effects that form the reason for its criminalisation to be based on reality rather than on automatic assumption or philosophical dogma. Yet that is not the Court’s approach. Even though the empirical evidence submitted to the Court shows that interaction between veiled women and others in society may not be so low as to warrant such strong measures, the Court stated without further justification that the French State ‘may consider’ that face covering has an adverse impact on human interaction to the point of justifying a rights-restrictive response.

In the next step, the proportionality assessment, the Court continued to eschew questions that may be considered critical to the debate, such as whether it is justified to use the criminal law to force people to look more socially approachable to others in the entire public sphere; and whether it can reasonably be assumed that such an approach will have the desired result of improving human interaction between these women and others in the public sphere.

On the latter question, the empirical research from France – that was submitted to the Court – shows clearly that the ban has *decreased* the level of social participation of these women.⁶³ In fact, many women who choose to wear a face veil are strongly attached to it, and continue to wear it despite the ban, yet avoid going out except by car. They are afraid of an encounter with the police, as well as of harassment and aggression by strangers who feel that the ban legitimizes such behaviour.

Remarkably, the Court admitted to this isolating effect of the ban:

In addition, there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related

⁵⁹ *SAS v France*, para 122.

⁶⁰ *Ibid* para 141.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ OSJF (n8) 14.

to their beliefs. As stated previously, they are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity.⁶⁴

Once it is accepted that the ban increases isolation of the women who are affected by it, it seems difficult to consider the ban as a measure that may improve ‘living together’, at least if this living together is supposed to include these women. Yet that does not seem to bother the Court in its finding that the ban is a fine measure for promoting living together.

Things become even more puzzling when the Court also expresses concern over the face covering ban’s effect on the rise of intolerance:

In this connection, the Court is very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010 . . . It is admittedly not for the Court to rule on whether legislation is desirable in such matters. It would, however, emphasise that a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance.⁶⁵

The face covering ban’s effect as a catalyst of serious street harassment against face veil wearers has indeed been documented in the study by Open Society Foundations on the effects of the French ban that was submitted to the Court.⁶⁶ The findings suggest that “(t)he ban and public discourse seems to have implicitly legitimized the abusive treatment of veiled women”.⁶⁷

In most interpretations, this would be considered evidence of another negative impact of the face covering ban on ‘living together’ (in addition to the isolating effect mentioned *supra*). Yet this does not impress the Court, which nevertheless ruled that the ban can be justified as a measure to promote ‘living together’. This suggests either a conception of ‘living together’ that is highly theoretical, or a conception that does not bother about exclusion. Both are problematic. Indeed, the *prima facie* explanation for the contradictions observed above, is that the Court will allow a state to adopt rights-restrictive measures through its criminal law in the name of a theory that it considers plausible, regardless of any evidence concerning the actual effects of such measures. The Court would thus be leaving aside its oft-repeated principle that “it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory”.⁶⁸ Another explanation is one that suggests the Court’s acceptance of the pursuit of an exclusionary type of ‘living together’. That is to say that the women who wear a face veil are not *per se* included in the objective of a public sphere characterized by unencumbered human interaction. When the public sphere is cleared of those women, the goal is considered reached. Arguably, that is what most people who support a face veil ban have in mind: if the ban improves human interaction in the public sphere, this is not because they will finally be able to

⁶⁴ *SAS v France*, para 146.

⁶⁵ *Ibid* para 149.

⁶⁶ OSJF (n8) 14.

⁶⁷ *Ibid*.

⁶⁸ See a long line of case law, starting with *Marckx v. Belgium*, App no 6833/74. (ECHR, 13 June 1979) para 41; *Airey v. Ireland*, App no 6289/73 (ECHR 9 October 1979) para 26.

approach these (former) face veil wearers and interact with them, but rather because the unpleasant sight of face veil wearers will no longer interfere with their enjoyment of the public sphere and with their interaction with their own kind. Whereas the behavioural version of the ‘living together’ argument (wrongly) assumes that veiled women do not wish to interact with others in the public sphere, the philosophical version of the same argument results in sheltering the majority population that does not wish to interact with veiled women.

The only explanation given by the Court itself – if it can be called an explanation – is the justification of its hands-off approach by stating that it should exercise restraint in the face of a ‘choice of society’ made through a democratic process.

... the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society ... It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.

In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question ... ⁶⁹

This is extremely problematic reasoning, as the Court appears blind to the minority rights dimension of the case. There is no mention of any quality requirement of the political process and in particular of the need for it to include minority voices.⁷⁰ This reasoning legitimizes a majority banning minority expressions from the entire public sphere on the sole basis of an ideological position that is the expression of the majority’s culture.

Ultimately, the point that is made in a lot of the criticism of the Court’s ‘living together’ reasoning, is that it is doubtful whether this concept, at least in the manner in which it has been used in *SAS*, can perform the crucial function of drawing the line between justifiable measures in the general interest and unjustifiable harassment of minorities. It is submitted that a natural way of improving the Court’s mode of reasoning in that sense, is through evidence requirements. Even when a wide margin of appreciation is granted, the Court should not be contented with finding that a plausible general interest (‘living together’) was invoked, but should also require evidence that such interest is at stake in the concrete context of the case. This is exactly what the Court does in *SAS* when it dismisses the pursuit of gender equality as a legitimate aim supporting a general face covering ban.⁷¹ The Court’s reasoning, that it is not sufficient that, according to majority opinion, a minority practice touches upon an important general interest⁷² (in this case gender equality), yet that it should be shown concretely that this interest is in fact at stake, can be applied also to other ‘legitimate aims’, and *in casu* to the invoked ‘legitimate aim’ of ‘living together’. Without such a requirement of establishing the need for a rights-restrictive measure – *in casu* by providing evidence that ‘living together’ is under threat in France by the practice of women covering their face – there is no guarantee against the risk that what is presented as a ‘choice of society’ might be a cover-up for minority harassment.

⁶⁹ *SAS v France*, para 153–154.

⁷⁰ On the importance of this, see Ouald Chaib, and Brems (n10).

⁷¹ *SAS v France*, para 119.

⁷² Cf. restatement of para 119 of *SAS v France* by the Belgian Council of State in its recent breakthrough judgment on headscarves at school: Council of State, department of administrative jurisprudence, judgment no 228.752 of 14 October 2014, *Gadghadhi a.o. v Gemeenschapsonderwijs*, para 37.2.

CONCLUSION AND FUTURE PROSPECTS

Face veil bans have been justified amongst others on grounds of the protection of women's rights. Upon closer analysis, this is not about protecting the autonomy rights of women to decide whether or not to wear the face veil. It is instead about removing (perceived) symbols of gender oppression from the public sphere, giving in to majority constructs of minority behaviour as undesirable symbols. The ECtHR saw through this, and rejected such constructs on account of their lack of evidence-based justification.

Yet in the same face veil case, the European Court of Human Rights tolerated highly paternalistic claims of control by authorities over social behaviour in the public sphere and legitimized a dominant majority group's monopolizing of the entire public sphere and using the criminal law to force expressions of minority identity to conform to majority preference.

The present contribution has highlighted some of the problematic aspects of the Court's reasoning in this case, in particular in the light of empirical evidence concerning the lived realities of women who wear/wore a face veil in France and Belgium.

While the face covering ban in France has been upheld by a Grand Chamber of the Court in *SAS v France*, two claims against the Belgian ban remain pending. The cases of *Belkacemi and Oussar v Belgium*⁷³ and *Dakir v Belgium*⁷⁴ concern women who wear/wore a face veil in Belgium, and who were confronted with municipal face covering bans as well as with the nationwide criminal ban. Whereas it is unlikely that the Court will overrule its Grand Chamber judgment in *SAS* in these Belgian cases, there is nevertheless a possibility that it might choose to distinguish those cases from *SAS* and/or to shift some of its discourse. In a third party intervention in *Dakir v Belgium*,⁷⁵ the Human Rights Centre at Ghent University explores the differences between the French and Belgian cases that may be a basis for distinguishing. There are three: The first is the combination in Belgium of municipal bans, entailing administrative fines, with a nationwide criminal ban, entailing criminal fines. The second difference is the fact that the Belgian ban, as opposed to the French ban, does not include a provision that penalizes a person who forces another to cover her face; it only penalizes the person herself who covers her face. This may invite the Court to express its opinion on the penalization of victims. The third difference is the one most suitable for the purpose of distinguishing the cases from *SAS*. It concerns the fact that in Belgium, the process leading toward the adoption of the ban was much less elaborate than in France, foregoing in particular the collection of expert opinions, the inclusion of advice on legality and conformity with human rights, and the discussion in both chambers of parliament. The process moreover did not substantially engage with human rights arguments. The judgment in *SAS v France* has been highlighted by judges as well as scholars as an example of a 'procedural turn' in the Court's case law, on account of its deference to a 'choice of society' that was the result of a long process.⁷⁶ Given the important differences in the quality of the processes leading to similar legislation in France and Belgium, the Belgian face covering cases invite the Court to further explain and develop its procedural quality control of domestic legislation and the way in which this control is linked to the margin of appreciation.

⁷³ App no 37798/13.

⁷⁴ App no 4619/12.

⁷⁵ The text of the intervention is available at <<http://www.hrc.ugent.be/third-party-interventions-before-ecthr>> accessed 21 December 2015.

⁷⁶ See Human Rights Centre, Third Party Intervention in *Dakir v Belgium* (n5).

The second part of the third party intervention, analyses the 'living together' argument in the Belgian context. After analyzing the mobilization of this argument in the Belgian parliamentary debates, it confronts the arguments made in this respect with the findings of empirical research among women who wear/wore the face veil in Belgium. The empirical findings reveal the erroneous character of one of the assumptions of the Belgian legislator, i.e. that women who wear the face veil are not able to and do not wish to interact with other in society. They also suggest that the ban is counterproductive, as it in fact reduces the social interactions of those women who despite the ban do not wish to go out uncovered. Noting this gap between the ban's stated intent and its actual impact on social interaction, and noting also the broader societal context that is characterized by high levels of islamophobia, the intervention then makes the case as argued above for evidence requirements in the context of human rights restrictions. It is suggested that the Court should ask the Belgian government for evidence in support of its claim that the face veil threatens 'living together' in Belgium, as well as in support of its claim that the ban is an adequate measure to safeguard or improve 'living together'. It seems unlikely that the Court would give up the 'living together' argument in its treatment of the Belgian cases. But there is a sparkle of hope that, in the light of the massive criticism of the way in which this argument was used, the Court might improve its reasoning in this respect.

HUMAN RIGHTS, IDENTITY AND THE LEGAL REGULATION OF DRESS

JILL MARSHALL*

INTRODUCTION

Law, particularly anti-discrimination or equalities and human rights law, is supposed to protect our fundamental freedoms in a liberal democratic system. Such freedoms include rights to religious and other forms of expression protected in various human rights laws. In European human rights law, such rights include those set out in Articles 8 to 11 of the European Convention on Human Rights (ECHR) which allow elements of who we are, our identities, - including our religious beliefs – to be visible to others. However, these rights are restricted and qualified by the rights and freedoms of these others. In liberal democracies, the contradiction between the rights holder as an individual, bounded ‘atomistic’ person, yet somehow to be balanced with others’ rights is most obviously seen in these qualified rights of respect for one’s private life, free speech, religious expression and associating with others. In this paper, these issues are critically explored, particularly by reference to the European Court of Human Rights’ (ECtHR) jurisprudence but sometimes from other international and national human rights courts, to see if, and if so, how, such interpretations lead to exclusion, lack of recognition and silencing of those whose dress is restricted. Will such interpretations lead to the shutting down of debate and unduly restrict who we are allowed to be?

Some aspects of the expression of our identities have had success under human rights law, but many have not. The difficulty appears to be caused by the requirement to balance individual rights with the rights of others, and who holds the power in these situations. Society has become more accepting of some types of appearance as a reflection of who we ‘really’ or ‘truly’ are. These cover the grounds for discrimination commonly found in anti-discrimination law including race, sex, religion and disability. However, these focus on seemingly fixed and immutable characteristics as grounds of action. A preferable central requirement of discrimination would be, as Sandra Fredman argues, that “a person or group has been discriminated against when a legislative distinction makes them feel that they are less worthy of recognition or value as human beings, as members of society”.¹ Yet even for the accepted grounds, legal success can be elusive. Legally justifiable different treatment can be explained through ‘grooming policies’ in the workplace, or the supposed ‘unreasonable’ and ‘ostentatious’ style of appearance. This can be seen in case law concerning hairstyles. For example, ‘the dismissal was caused by braids, or dreadlocks or finger waves’, not race;² or the problem is a full length

*School of Law, University of Leicester. Professor Marshall specializes in human rights and feminist jurisprudence. She is the author of three books including *Human Rights Law and Personal Identity* (Routledge 2014). Comments welcome to jill.marshall@le.ac.uk or by post to Leicester Law School, University of Leicester, University Road, Leicester LE1 7RH. See also J Marshall ‘The legal recognition of personality: full-face veils and permissible choices’ (2014) 10 *International Journal of Law in Context* 64–80 and *Human Rights Law and Personal Identity* (Routledge 2014).

¹ Sandra Fredman, *Discrimination Law* (Clarendon Press 2011) 43.

² See the US case of *Hollins v Atlantic Company Inc.* 188 F.3d 652 (6th Cir. 1999). The court found there was a question of fact as to whether the employer’s grooming policy, which allegedly was not applied to white women, was a pretext for discrimination. See also *Burchette v Abercrombie & Fitch Stores Inc.* 2010 WL 1948322 where a multiracial woman with blonde highlights in her hair was reprimanded and informed not to return to work until she dyed her hair black again. Abercrombie obtained summary judgment in their favour because the policy was seen as racially neutral. However, in *EEOC v Abercrombie & Fitch Stores Inc.* 575 US (2015) 1–10, the US Supreme Court held that the same company could not make an applicant’s religious practice a factor in employment decisions: this applies whether or not the applicant has informed the employer of a need for accommodation. Here, the company refused to hire a woman because the headscarf she wore for religious reasons conflicted with their dress policy.

covering like a *jilbab* or a face veil seen as, amongst other things, too ‘ostentatious’ or ‘unreasonable’, and not religious (or racial or sex) discrimination.³

In totalitarian North Korea, there are reportedly 28 state permissible, approved hairstyles.⁴ One would not expect such oppression on personal appearance in liberal democracies in Europe. Somewhat disappointingly then, in certain European countries, a woman is not allowed to wear a headscarf on her hair in public sector work; or a full face veil walking down the street in France and Belgium.⁵ People are told, through legal penalty, that they cannot look a particular way. Many argue that, if they do dress this way, their human rights are protected because they are ‘free’ to leave their employment or stay indoors. In cases that purport to be based on a ‘choice’ over one’s appearance, such as a hairstyle or an item of clothing, human rights law is often of little assistance. This shows the potential for disconnect between how we perceive ourselves and how others perceive us. Other people’s experience of us through this manifestation leads to their, often inaccurate, judgements about us. I argue that if the law is interpreted this way, this can constitute a misrecognition and disrespect of the person affected. Making legal decisions as to permissible choices and lifestyle behaviour, including in the form of dress, even in a liberal democracy, causes problems, most evident in factual situations involving dress deemed offensive and found unacceptable by the majority for a variety of reasons, followed up through restrictions and bans in the name of the majority’s specific traditions, cultures, moral sensibilities and national principles. Human rights law exists to assist those in need, minorities, and to ensure our personal freedom. If one fits with society’s norms and values and beliefs, one is less likely to need human rights law’s protection.

EXPRESSIONS OF IDENTITY

Freedom of expression, association and peaceful assembly are enshrined in the Universal Declaration of Human Rights and the ICCPR.⁶ Under article 19 of the Universal Declaration, “everyone has the right to freedom of thought and expression; this right includes freedom to hold opinions without interference and to seek receive and impart information and ideas”. Under article 20 (1), “everyone has the right to freedom of peaceful assembly and association.” The ICCPR permits restriction of these rights, but only when provided by law and necessary to protect the rights, or, in the case of expression, reputation, of others or national security, public safety, public order or public health or morals.

As Macklem convincingly argues, freedom of expression is about more than a representation to the world. Expressing oneself is as much about *creation* as it is about representation. Freedom of expression is not merely the freedom to communicate one’s *existing* voice to others. It is more importantly the freedom to develop a *distinctive voice of one’s own*.⁷ Laurence Tribe has expressed criticism of the tendency by most US courts to reject constitutional challenges to state-imposed regulations of appearance, such as hair length and clothing. As he expresses it:

³ See analysis in *R (on the application of SA Watkins-Singh) v The Governing Body of Aberdare Girls’ High School* [2008] EWHC 1865 (Admin).

⁴ See Sara C Nelson ‘North Korean hairstyles: Pyongyang salons display menus of state sanctioned trims (pictures)’ (*The Huffington Post UK*, 20 February 2015) <www.huffingtonpost.co.uk/2013/02/21/north-korean-hairstyles-pyongyang-salons-menus-state-sanctioned-crops-pictures_n_2733715.html> accessed 26 April 2016.

⁵ See further below.

⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 19–20; 999 UnTS 171 (ICCPR).

⁷ T Macklem, *Independence of Mind* (Oxford University Press 2006) ix, emphasis mine.

one need not regard a person's hair length as fully equivalent to speech in order to perceive that governmental compulsion in this realm invades an important aspect of personality.⁸

Tribe expresses special concern for regulations that affect young people for whom "the freedom to shape one's personality through appearance" is "fundamental."⁹ Kahn comments that this is an elaboration of constitutional doctrines that are ultimately grounded in a legal recognition not only of the general value of human dignity, but of its more particularized manifestation as it bears on maintaining the conditions necessary for individuation—the realization of one's distinctive identity as a unique human being.¹⁰ Bloustein proposes an explicit link between individual privacy and the right of association. "The right to be let alone" he asserts:

protects the integrity and dignity of the individual. The right to associate with others in confidence—the right of privacy in one's associations—assures the success and integrity of the group purpose.¹¹

Kahn expresses the view that one of the cases most clearly embodying Bloustein's concerns is *NAACP v. Alabama*. The case concerned the requirement of the organization NAACP – the National Association for the Advancement of Colored People – to reveal to the State's Attorney General the names and addresses of all its members and agents in the state.¹²

we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.¹³

According to the ECtHR's well-established case law, all of the qualified rights to respect for private life, freedom of expression, religious or otherwise, and freedom of association constitute essential foundations of a democratic society and basic conditions for its progress and the self-fulfilment of each individual.¹⁴ The state, the ECtHR explains, should use its powers 'sparingly' to protect its institutions and citizens from associations that might jeopardise them. Exceptions to the right to free association "are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom."¹⁵ States only have a limited margin of appreciation in restricting Article 11 rights.¹⁶ In *Moscow Branch of the Salvation Army v Russia*, the ECtHR examining Article 9 in the light of Article 11, explains that the rights safeguard "associative life against unjustified State interference".¹⁷ It continues:

⁸ L Tribe, *American Constitutional Law* (Foundation Press 1988) cited by J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall Law Review 371, 403ff.

⁹ L Tribe at 218 cited in J Kahn *Ibid*. See *Kelly v. Johnson* 425 U.S. 238 (1978). In this case before the US Supreme Court, a police department's regulation of officers' hairstyles was upheld as permissible.

¹⁰ J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall Law Review 371.

¹¹ E Bloustein, 'Group Privacy: The Right to Huddle' (1977) 8 RUTGERS-CAM. L.J. 219, 278.

¹² 357 U.S. 449 (1958) from J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 Seton Hall Law Review 371, 401.

¹³ 205 *Roberts v United States Jaycees* 468 U.S. 609 (1984) at 618–19 (citations omitted).

¹⁴ See, for example, *Tammer v Estonia* (2001) 37 EHRR 857 [59].

¹⁵ At para 62.

¹⁶ At para 76.

¹⁷ At para 58.

the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention . . . the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is . . . at the very heart of the protection which Article 9 affords. The State's duty of neutrality and impartiality . . . is incompatible with any power on the State's part to assess the legitimacy of religious beliefs.¹⁸

In legally regulating dress in liberal democracies, it is usually assumed that we start from a position of initial personal freedom, including freedom to wear what we want. Law then steps in to restrict this freedom in certain circumstances. An individual's right to freedom of religion and conscience is an absolute human right. However, manifestations, of a religious or any other kind, are not. This connects to our right to identity now existing through jurisprudential development at the ECtHR on Article 8:

the concept of "private life" . . . can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life . . . Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world . . . the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.¹⁹

Legally regulating what people wear is nothing new.²⁰ There are legal regulations in many parts of the world on wearing certain clothing, including 'extreme' political dress, such as the wearing of Nazi regalia and other politically offensive outfits.²¹ In some Muslim states, the wearing of certain clothing is compulsory, usually for women.²² Often, there are restrictions that apply in certain limited contexts or spaces, most notably in the workplace, especially in public sector employment, and in schools. However, more recently restrictions in all public places have also come into existence. In the next section, I explore some aspects of these areas by reference to case law examples involving adults.

IDENTITY AND THE LEGAL REGULATION OF DRESS

In the Workplace

The workplace is an important sphere for the manifestation of our identity. It is for many an intrinsic part of who we are. A working 'persona' may be shown and presented which is likely to be different to who we are, our identity, for example, at home, with our parents, our friends, our spare time activities, or clubbing or whatever else we choose to do on a Saturday night. Often, businesses want to increasingly present a corporate brand or personality into which we as individual persons have to fit.

We spend a significant portion of our lifetimes in working relationships. Aspects of our working life, the material well-being it brings, our private lives, our religious beliefs or non beliefs, all of which are necessary for our identity to be sustained, illustrate the

¹⁸ Citing *Metropolitan Church of Bessarabia and Others and Hasan and Chaush v Bulgaria* [GC] at para 62) (all para 58 of Moscow Salvation Army).

¹⁹ *Pretty v the UK* (2002) 35 EHRR 1 [61].

²⁰ In 1746, the Dress Act banned the wearing of tartan. See <www.tartansauthority.com/resources/archives/the/archives/scobie/tartan-and-the-dress-act-of-1746> accessed 26 April 2016, and <www.scotclans.com/scottish_history/jacobean_scotland/1746_proscription.html> accessed 26 April 2016.

²¹ See, for example, *Strafgesetzbuch* § section 86a

²² For example, in Iran and Saudi Arabia.

‘redrawing of the public/private divide.’²³ However, when it comes to employment law situations, many applicants are unsuccessful in their legal claims on the basis of free expression, religious or otherwise. This section is not meant to provide a comprehensive employment law exposition of all these issues. It is used to illustrate some examples of the lack of existence of self-determining identity rights in practice through examples involving dress.

The 2013 ECtHR *Eweida* case examined some of these matters in some depth.²⁴ The Court noted that analysis of the law and practice relating to the wearing of religious symbols at work across various Council of Europe states demonstrates that in the majority, the wearing of religious clothing and or religious symbols in the workplace is unregulated. In three, the wearing of religious clothing and or religious symbols for civil servants and other public sector employees is prohibited but in principle it is allowed for employees of private companies. In five countries – Belgium, Denmark, France, Germany and the Netherlands, the domestic courts have expressly admitted an employers’ right to impose certain limitations on the wearing of religious symbols by employees. But there are no laws or regulations expressly allowing an employer to do this. The Court noted that at the time of Judgment, in France and in Germany, there was a strict ban on the wearing of religious symbols by civil servants and state employees.

The Court referred to its previous case law and that of the Commission which indicates that if a person is able to take steps to circumvent a limitation placed on his or her religion or belief, there is no interference with the rights under Article 9 (1) and the limitation does not therefore need to be justified by Article 9(2). Reference was made to decisions that mention the possibility of resigning from the job and changing employment. This meant that there was no interference with the employee’s religious freedom.²⁵ The Court expressed some reservations regarding this approach, making clear that this approach had not been applied in relation to other rights protected by the Convention. For example, this has not happened in the right to respect for private life under Article 8, the right to freedom of expression under Article 10 or the negative right not to join a trade union under Article 11. This is an important step for the Court, and has been described as ‘an important turning point.’²⁶

The Court noted that Ms Eweida’s wish to wear a small Christian cross at work could be considered as her fundamental right because a healthy democratic society needs to tolerate and sustain pluralism and diversity, with it being seen as important for many religious people to be able to communicate their beliefs to others. At the same time, the Court recognised that an employer may wish to project a certain corporate image. While this is legitimate, the Court decided that the domestic court accorded too much weight to it and a fair balance had *not* been struck in the case. In deciding in her favour, the ECtHR referred to the ‘discreet’ nature of this particular cross, noting it cannot have detracted from her professional appearance. It is unclear if the Court means that an overtly visible sign of religion would therefore detract from one’s professional appearance, and if so, what exactly is the problem with being professional and, at the same time, showing one’s religion, or other identity through overt expression. The later amendment of BA’s code to allow employees to wear a cross demonstrated

²³ European Social Charter ILO, see para 47. H Collins, ‘The Protection of Civil Liberties in the Workplace’ (2006) 69(4) MLR 619, 628.

²⁴ *Eweida and others v UK* Application Numbers 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 27 May 2013).

²⁵ See *Konttinen v Finland* Commission’s decision of 3 December 1996, Decisions and Reports 87-A, 68; *Stedman v the UK*, Commission’s decision of 9 April 1997; compare *Kosteski v ‘the former Yugoslav Republic of Macedonia’* no 55170/00 para 39 13 April 2006.

²⁶ J Maher ‘Proportionality Analysis after *Eweida and Others v UK*: Examining the Connections between Articles 9 and 10 of the ECHR’ (21 June 2013) <http://ohrh.law.ox.ac.uk> accessed 10 September 2014.

to the Court that the earlier prohibition was not of crucial importance.²⁷ However, in the case of the second applicant in the same decision, Chaplin, there was held to be a justifiable interference in her wearing a cross around her neck. Chaplin was a nurse on a geriatric ward. This was a public authority employer. The reason for the policy was to protect the health and safety of nurses and patients. There was a risk a disturbed patient might seize and pull the chain or that it might swing forward and come into contact with an open wound. Other employees had been similarly restricted. She could have worn the jewellery under a high-necked top.²⁸ Such restriction was therefore not disproportionate.²⁹ Such a restriction makes sense if health and safety considerations like these apply.

For some commentators, the jurisprudence of the ECtHR focuses on choice. It is the employee's choice to work at a particular workplace. They can choose to leave.³⁰ On this viewpoint, in the previous ECtHR case law, employees could choose to resign and find alternative employment.³¹ However, in the *Eweida* case, the ECtHR is more sympathetic to religious views and this is not the position reflected in its judgment. Rather than holding that the possibility of changing job would negate any interference with the right, the Court explains that a better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.³²

As Stephanie Palmer has observed, appearance in workplace cases "have not met with great success in the UK".³³ Such cases are normally brought under discrimination legislation. In the 1970s case of *Schmidt v Austicks Bookshops Ltd*,³⁴ where female employees were not allowed to wear trousers, the Court held this was not sex discrimination. In somewhat circular reasoning, it states there were rules for both men and women as to clothing:

although obviously, women and men being different, the rules in the two cases were not the same' and an employer is granted 'a large measure of discretion in controlling the image of his establishment, including the appearance of staff, and especially so when . . . they come into contact with the public'.³⁵

In *Dansie v Metropolitan Police*,³⁶ the Dress Code of the Metropolitan Police was held to be equally balanced between the sexes, and there was no discrimination against Mr Dansie, a trainee, who was required to cut his hair (or leave). Mr Dansie had his hair slicked back and in a bun. This style would have complied with the Code if he had been a woman. However, the Employment Appeals Tribunal stated that the correct legal test to apply in England is whether, applying contemporary standards and conventions, as well as the specific needs of the profession in question, the employer's dress code as a whole was asking its employees to display an equivalent level of smartness as between the sexes. In stating this to be the law, they applied the earlier cases of *Smith v Safeway*

²⁷ All at para 94.

²⁸ All at 98.

²⁹ At para 100.

³⁰ N Gibson, 'Faith in the Courts: Religious Dress and Human Rights' 66 (2007) Cambridge Law Journal 657.

³¹ See, for example, *Kontinnen v Finland* (n25) and *Stedman v the UK* (n25). See also *X v Denmark* Application no 7374/76 5 D&R at 157–158.

³² *Eweida* (n24) [83].

³³ S Palmer 'Human Rights: Implications for Labour Law' (2000) 59 CLJ 168, 187. See also for analysis of American law on appearance: D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* (OUP 2010).

³⁴ EAT 1978 ICR 85.

³⁵ At 88.

³⁶ [2009] UKEAT 0234_09_2010.

*Plc*³⁷ and *DWP v Thompson*.³⁸ In *Smith v Safeway* a man was dismissed for refusing to cut his hair. This was held not to be discriminatory on the grounds of his sex even where a woman with identical hair length would not have been dismissed. The court said requiring a conventional standard of appearance was not of itself directly discriminatory. In *DWP v Thompson*, the Employment Appeals Tribunal said it was not necessarily discriminatory for an employer to impose a certain dress code on men – in this case to wear a collar and tie – but not on women.

It is only in the last decade that religion and belief have become grounds for a discrimination action in the UK, following EU directives.³⁹ Prior to this, some people of certain religions received protection because they were perceived as ‘an ethnic minority’ under race equality legislation.⁴⁰ The United Kingdom has traditionally had little issue with the expression of religious views through the wearing of the Islamic headscarf. However, the issue has in recent years come to the fore in a number of cases and through media attention. For example, when he was Leader of the House of Commons, Jack Straw MP, once a Labour Party Home Secretary, voiced his concerns about being able to properly communicate when talking to constituents with veiled faces.

A young teaching assistant, Aisha Azmi, was dismissed from work for wearing a face covering and took her claim to an employment tribunal with wide, largely negative, press coverage.⁴¹ In *Azmi*, the EAT held that as a bi-lingual support worker, her suspension was not direct discrimination and, even though indirectly discriminatory, it was proportionate.⁴² She worked with pupils from ethnic minority backgrounds including those at risk of under-achieving. She was suspended for refusing to remove her veil, or niqab, from her face in class. She had asked that she work only with female teachers. This would have enabled her to remove her face covering but this request could, apparently, not be accommodated.

In some countries, such as Turkey and France, a strict separation exists constitutionally between public and the private spheres. With state secularism’s importance, the idea is prevalent that individuals’ private religious beliefs ought not to be overtly displayed in the public sphere, most notably in state schools or while working in public sector employment.⁴³ Thus civil servants, including teachers, have been legally prohibited from displaying religious symbols in the workplace.

³⁷ [1996] ICR 868.

³⁸ [2004] IRLR 348. The Tribunal gave guidance as to the correct test to be applied and remitted the case to the ET. The case was subsequently settled and the dress code withdrawn.

³⁹ As first set out in the Employment Equality (Religion or Belief) Regulations 2003.

⁴⁰ *Mandla v Dowell Lee* [1983] 2 AC 548; *Seide v Gillette Industries Ltd* [1980] IRLR 427; *Commission for Racial Equality v Dutton* [1989] QB 783.

⁴¹ *Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MAA Judgment EAT 30 March 2007. This case was widely reported in the British media. See, for example, <<http://education.guardian.co.uk/schools/story/0,,2038239,00.html>> See discussion in Hill and Sandberg, ‘Is Nothing Sacred? Clashing Symbols in a Secular World’ (2007) Public Law 488.

⁴² Her claim for victimization was successful but the lowest sum of compensation possible was ordered.

⁴³ See S Poulter, ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17 Oxford Journal of Legal Studies 43. It is the recent adoption of a new law outlawing any religious sign or garment that overtly manifests the religious affiliation of the wearer in state primary and secondary schools which has provoked most recent comment. (see Law No 2004–228 of March 15, 2004, JO March 17 2004 p 5190 JCP 2004, III page 640. Available at <www.legifrance.gouv.fr> See analysis in D Lyon and D Spini, ‘Unveiling the Headscarf debate’ (2004) 12 Feminist Legal Studies 333; B Gokarikel and K Mitchell, ‘Veiling, secularism, and the neoliberal subject: national narratives and supranational desires in Turkey and France’ (2005) 5 Global Networks 147; J Vaisse, ‘Veiled Meaning: The French Law Banning Religious Symbols in Public Schools’ at <http://www.brookings.edu/research/articles/2004/03/france-vaiss> last accessed 4 May 2016; E.T. Beller, ‘The Headscarf Affair: The Conseil d’Etat on the Role of Religion and Culture in French Society’ (2004) 39 Texas International Law Journal 581. C Laborde, ‘Secular Philosophy and Muslim Headscarves in Schools’ (2005) 13 The Journal of Political Philosophy 305; M Idriss, ‘Laïcité and the banning of the “hijab” in France’ (2005) 25 Legal Studies 260; S Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004); S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 94–102.

Many German *lander* or states have passed laws prohibiting teachers in public schools from wearing visible religious clothing and symbols. It is reported that debates surrounding the passing of such laws illustrate that the Islamic headscarf is the principal target.⁴⁴ In March 2015, the German Federal Constitutional Court delivered its judgment on two cases dealing with a general prohibition against teachers wearing the headscarf and declared this unconstitutional under the German Basic Law. Article 4 protects freedom of faith and conscience, Article 2 protects personality, Article 3 protects gender equality and Article 12, free choice of profession. The Court said that limiting these rights was possible but “has to be based on concrete facts rather than on generalised abstract opinions or prejudice,”⁴⁵ The Erlangen Centre for Islam and Law in Europe highlights the Court reasoning on the need to avoid abstract evaluation that the headscarf represents values opposed to those of the Constitution, such as gender equality and human dignity, “Wearing a headscarf can be an individual choice on the basis of tradition or identity”⁴⁶

Countries imposing bans on the wearing of the Islamic headscarf and the full face veil profess to justify them on a variety of grounds. As reflected in the German decision, the bans are evaluated on the basis of abstract values like *secularism* and *gender equality* as well as the *human dignity of women*. References to the dignity of women in the state’s interpretation often involve some sort of idea of freeing women from oppression and trying to ensure gender equality, through criminalising their behaviour. For example, it has been stated that full face veils are ‘*discriminatory, harmful, and contrary to the dignity of women and real and effective equality between men and women*’.⁴⁷ Integration, national identity and citizenry arguments are made with the aim of showing that bans are a solution to threats to national identity or secular citizenship.

Cases concerning the wearing of the Islamic headscarf by adult women have been decided at the ECtHR where in my view a restricted view of personal identity is evident. In these cases, the issue has been Islamic headscarf bans in public education institutions and most recently in public sector employment.⁴⁸ The cases have concerned France, Switzerland and Turkey where bans on adult women wearing the headscarf are (or were) in force in certain circumstances.⁴⁹ Any interpretation by the European Court is on the basis of Article 9. Sometimes, it is decided that the right is not engaged, sometimes it is engaged but the applicants are ultimately unsuccessful because of the

⁴⁴ Two of these states impose the same restriction more widely on some or all other civil servants. See in general <www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0> accessed 20 April 2016 and www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe> accessed 20 April 2016.

⁴⁵ ‘The Decision of the German Constitutional Court regarding Muslim teachers wearing a headscarf in public schools – A landmark decision for preserving true state neutrality and fact-orientation against widespread prejudice.’ Erlangen Centre for Islam and Law in Europe 13 March 2015, available at <www.ezire.uni-erlangen.org> accessed 20 April 2016.

⁴⁶ As above. See also commentary by C Haupt ‘The ‘New’ German Teacher Headscarf Decision’ available at <<http://www.icconnectblog.com>>; C Stark ‘Opinion: German Court ruling to allow headscarves for teachers means freedom for all’ available at <www.dw.com?>, both accessed 4 November 2015.

⁴⁷ As cited in <www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe>

⁴⁸ J Marshall ‘Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate (2008) 30 Human Rights Quarterly 631–654; J Marshall ‘Women’s Right to Autonomy and Identity in European Human Rights Law: Manifesting One’s Religion’ (2008) 14 Res Publica 177; J Marshall, *Personal Freedom through Human Rights Law?* (Brill 2008).

⁴⁹ *Karaduman v Turkey* application no. 16278/90 (3 May 1993); *Dahlab v Switzerland* application no. 42393/98 (15 February 2001); *Dal and Ozen v Turkey* application no. 45378/99 (decision 3 October 2002); *Baspinar v Turkey* application no. 45631/99 (decision 3 October 2002); *Sen and Others v Turkey* application no. 45824/99 (admissibility decision 8 July 2003). *Sahin v Turkey* application no 44774/98 (Chamber judgment 29 June 2004), available at <www.echr.coe.int/echr>. Sahin most fully explores the issues involved. There is one dissenting judge, Judge Tulkens who found a violation of Article 9 and Article 2 of Protocol 1. The most recent case is *Ebrahimian v France* (26 November 2015) where a woman who wore a headscarf faced non-renewal of her employment contract at a public hospital for refusing to remove her headscarf.

qualification in paragraph 2 of the provision. At times, the right to education set out in Article 2 of Protocol 1 is also relied on and the same reasoning is employed by the court in its decisions. Accordingly, the restrictions on religious headscarves are allowed on the basis that they are prescribed by law, follow a legitimate aim and are necessary in a democratic society. In deciding the last element of these, amongst other things, the rights and freedoms of others, and gender equality have been said to be important. I have previously argued that this case law is inconsistent with the same court's case law on a right to autonomy and identity to be found in its interpretations of Article 8 where, as Judge Tulkens says, the court has developed 'a real right to personal autonomy'.⁵⁰

In all Public Places

Since April 2011, the French government has prohibited, in any public space, the wearing of clothing 'designed to conceal the face'.⁵¹ It is also illegal to force another to wear such a garment.⁵² The wording of the bans or proposed bans does not explicitly refer to the Islamic *burqa* or the full face veil. Concealing the face is described in neutral terms with reference in the French legislation to punishing those who force another to wear clothing designed to conceal the face 'by reason of the sex of said person'.⁵³ However, the explanatory notes attached to the legislation, and the nature of the political and media debates make clear that the Islamic full face veil is the target.⁵⁴ The French legislation's notes state that "to compel a woman, regardless of her age, to conceal her face is an affront to her dignity. It also contravenes the principle of gender equality". Estimates of the number of girls and women in Europe who wear the full face veil vary and are unlikely to be accurate given the difficulty in quantifying dress practice. The non-governmental organisation, Human Rights Watch, has reported that they constitute a very small minority. The estimated figures they quote are 700 to 2000 women in France, but this was before the ban.⁵⁵

A similar ban was enacted in Belgium in June 2011.⁵⁶ A Belgian Liberal party MP is reported to have claimed that Belgium would "break through the chain that has kept countless women enslaved" by enacting this legislation.⁵⁷ Estimates of the number of women who wear the face veil are again hard to quantify in Belgium: Human Rights Watch mention 300 to 400 women. In 2012, the Belgian Constitutional Court upheld this ban as constitutional, but interestingly in 2014, Council of State Judgment rejected abstract principles and speculations as a basis of headscarf bans and limited them to occasions where

⁵⁰ See Judge Tulkens in her dissenting opinion in the *Sahin* case.

⁵¹ Act No 2010–1192 of 11 October 2010 prohibiting the concealing of the face in public, Article 1. Public space comprises the public highway and premises open to the public or used to provide a public service. Exceptions can be made as may be provided for on, for example, health or sporting grounds: Article 2.

⁵² Forcing another person, by reason of their sex to conceal their face is punishable by a year in prison and a 30,000 Euro fine. This punishment increases to 2 years and a 60,000 Euro fine if the person so forced is a minor. Anyone who conceals their face will be subject to a fine of up to 150 Euros and/or compelled to attend a 'citizenship' course.

⁵³ Article 4.

⁵⁴ See, for example, <www.strasbourgobservers.com/1010/05/04/burqa-and-niqab-ban/>

⁵⁵ See in general <www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0> and <www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe>. These numbers may be too high – a recent report in The Guardian Newspaper put it at around 300 for women in France. However this is after the ban and the numbers may have reduced since its coming into force. See <www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa>. See also the interventions in the S.A.S. case which specify the empirical work carried out by the Human Rights Center at Ghent University, and the Open Society Initiative.

⁵⁶ The text introduces a new provision into the criminal code creating a new offence punishable by a maximum of 137.50 Euros and or detention of 1 to 7 days for: "those who, except for contrary legal provisions, are present in places that are accessible to the public with their faces completely or partially covered or hidden, such as not to be recognizable."

There are exceptions for the workplace, police regulations and festivities. Belgian criminal code, Article 563bis. See discussion by Eva Brems on www.strasbourgobservers.com/2011/04/28/belgium-votes-burqa-ban/

⁵⁷ See V Mock and J Lichfield 'Belgium passes Europe's first ban on wearing the burka in public' (*The Independent*, 1 May 2010).

there were concrete risks for the neutrality and rights of others.⁵⁸ One of the reasons for the face veil ban was a 'living together' caveat to freedom of expression, religious or otherwise, and our right to private life. Making much of the 'essential element of individuality' expressed through the face, it was said that covering this would make living together impossible.

This concept of 'living together' has now been recognised at the ECtHR in *S.A.S. v France* 2014 when the Grand Chamber ruled, by a majority of 15 judges to 2, that the French ban was not contrary to the ECHR, as will be explored more fully below. Comparable nationwide measures have been proposed in a variety of countries, including Spain, Italy, the United Kingdom and Denmark.⁵⁹

As we have seen, in previously decided cases concerning bans on wearing of the Islamic headscarf in educational and public sector workplaces, the Court has accepted the right of a state to justify its laws.⁶⁰ Even though, in this author's view, those cases have been wrongly decided, distinctions can be drawn between the proportionality of the prohibition on the full face veil, as the Islamic headscarf bans are not applicable in all public places, being confined to public education and or employment. Such a distinction can be seen in *Arslan v Turkey*.⁶¹ The ECtHR found a violation of Article 9 in the criminal conviction of members of a religious group for wearing the distinctive dress of their group. This consisted of turbans, tunics, baggy 'harem' trousers, and sticks worn by them on the streets after visiting a mosque. The Court emphasized that this case concerned punishment for the wearing of particular dress in public areas that were open to all and not, as in other cases before the court on religious dress, the regulation of wearing religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion. These bans and convictions were not necessary in a democratic society. Disappointingly, the Court in *S.A.S.*, whilst expressing awareness that the ban was broad and affected mainly Muslim women, thought it significant that the ban is not expressly based on the religious connotation of the clothing but solely on the fact that it conceals the face, and on this basis distinguished it from *Arslan*.⁶²

In *Vajnai v Hungary* criminal proceedings were brought against the applicant for wearing a five-pointed red star as a symbol of the international workers' movement at a lawful political meeting.⁶³ Article 10 was found to have been violated. The Court ruled that:

when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need.

⁵⁸ See commentary by E Brems 'Ebrahimian v France: Headscarf Ban Upheld for Entire Public Sector' (Strasbourg Observers 27 November 2015) available at <<https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/>> accessed 26 April 2016.

⁵⁹ For a brief summary of a country by country situation see *Article 19 Legal Comment, Bans on the Full Face Veil and Human Rights, A Freedom of Expression Perspective*, December 2010. For a timeline on the burqa bans in Europe, see generally <<http://strasbourgconsortium.org/index.php?pageId=14&contentId=29&blurId=1245>>. In the UK, a private member's bill was introduced for a first reading on 24 June 2013 and is due for a second reading on 28 February 2014: <<http://services.parliament.uk/bills/2010-11/facecoveringsregulation.html>> accessed 20 December 2013. UK Conservative Communities' secretary Eric Pickles MP described the French law as 'incomprehensible' and asserted that the British government had no intention to follow it: as conveyed in a Press Release by the non-governmental organisation, Liberty, on 21 May 2012. Liberty has intervened in the case of *S.A.S v France* Application no. 43835/11.

⁶⁰ *Karaduman v Turkey* Appl. No. 16278/90, 3 May 1993; *Dahlab v Switzerland*, Appl. No. 42393/98, 15 February 2001; *Sahin v Turkey* Application no. 44774/98, Grand Chamber Judgment 10 November 2005; *Dogru v France* Appl. No. 27058/05, 2008 ECHR 1579.

⁶¹ Application no 41135/98 ECHR 23 February 2010.

⁶² *S.A.S.* (n59) [151].

⁶³ *Vajnai v Hungary* [2008] ECHR 33629/06 (8 July 2008).

Consequently, utmost care and caution must be observed in applying any restrictions, particularly when the case involves symbols, which have multiple meanings. Society, the Court said, must remain reasonable. To hold otherwise, the Court asserted, would mean that freedom of speech and opinion is subjected to the ‘heckler’s veto’. The joint partly dissenting opinion of Judges Nussberger and Jaderblom in *S.A.S.* take a position in line with this reasoning. They say describing the face veil, as happened in the case, as a sign of ‘dehumanising violence,’ ‘effacement’ and ‘subservience’, is disputed by the applicant and many women like her who say they freely choose to wear a full face veil. They state that even assuming these are correct, the previous case law of the ECtHR shows that the Convention does not provide a right not to be shocked or provoked by different models of cultural or religious identity. The Convention protects not only opinions:

that are favourably received or regarded as inoffensive or as a matter of indifference, but also . . . those that offend, shock and disturb.’ such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”⁶⁴

This applies to dress codes demonstrating radical opinions. It is also a protected right not to communicate and not to enter into contact with others in public places; what the dissenting judges call “the right to be an outsider”.⁶⁵

The ICCPR’s Human Rights Committee (HRC) has found a violation of Article 18’s freedom of religious expression by France when it refused to grant a turban wearing Sikh man an identity card.⁶⁶ Because he had no card, he had no access to free public health care and other benefits. He particularly needed these as he was suffering from ill health.⁶⁷ The HRC decided that wearing a turban is regarded as a religious duty and is tied in with a person’s identity. The complainant had argued that there were violations of a variety of provisions of the ICCPR due to the refusal to grant him the necessary identity card.⁶⁸ He argued that wearing a turban is a religious obligation, an integral part of Sikhism, closely intertwined with faith and personal identity. The removal of his turban could be viewed as a rejection of his faith. He had a “deep attachment to using a turban because of his religion”. A photograph of him bareheaded would be “an affront to his religion and ethnic identity”.⁶⁹ As he explained it, appearing in public bareheaded is deeply humiliating for Sikhs and an identity photograph showing him this way would produce feelings of shame and degradation every time it was viewed.⁷⁰ If he did have the photograph taken without the turban, he would have to repeatedly remove it each time the card was checked which would be humiliating.⁷¹

Interestingly, this applicant argued that wearing a turban and its impact on identification ought to be compared to cutting, growing out or colouring hair and beards, wearing a wig, shaving one’s head or wearing heavy makeup. All of these, he argued, would have an impact on the ease of identification whilst the turban would not. And none of these are prohibited;⁷² or, at least, not yet.

⁶⁴ *S.A.S.* (n59) dissenting opinion [7].

⁶⁵ *Ibid.*

⁶⁶ *Singh v France* Communication no 1876/2009 HRC ICCPR 22 July 2011. See generally HRC General Comment 22 of 1993 which clarifies that the wearing of distinctive headgear is a protected form of religious practice.

⁶⁷ General comment No 18 1989 para 9.

⁶⁸ Arts 2, 12, 18 and 26 of UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <<http://www.refworld.org/docid/3ae6b3aa0.html>>. He cited in support of his arguments General Comment No 18 of 1989 on Article 26 which explained that wearing a turban is an integral part of a Sikh’s identity. He also referred to the Concluding observations of the Committee on Economic Social and Cultural Rights E/C.12/1/Add.72, 2001 paras 15 and 25.

⁶⁹ *Singh* (n66) [6.5].

⁷⁰ *Ibid* [3.1].

⁷¹ *Ibid* [3.4].

⁷² *Ibid* [6.3].

BAN CLOTHING AND LIVE TOGETHER WITH A PERMISSIBLE IDENTITY

As already noted, the 2014 *S.A.S.* decision relies on the importance of a concept largely unheard of in human rights language ‘living together’. In seeking to uphold the ban, the French government invoked, as legitimate aims, public safety and ensuring “respect for the minimum set of values of an open and democratic society”. In addressing this second aim, the French government referred to three values: human dignity, gender equality and respect for the minimum requirements of life in society – the concept of ‘living together’.⁷³ Public safety and living together were considered to be legitimate aims by the ECtHR. Human dignity and gender equality were not. Respect for human dignity, the Court said, could not justify a blanket ban on the wearing of the veil in public. The Court did not see it as expressing contempt for others in a manner than offenses against the dignity of others.⁷⁴ This is a welcome interpretation of human dignity.⁷⁵ Likewise, on gender equality, the Court expresses a different view to that of the majority in *Sahin*. The Court was not convinced in *S.A.S.* that gender equality justified this interference. The Court said that a state cannot invoke gender equality to ban a practice that is defended by women, including the applicant, as exercising their own rights and freedoms.⁷⁶

Whilst finding the bans interfered with Article 8 and Article 9 rights, the court found that under certain conditions the “respect for the minimum requirements of life in society” referred to by the French government or of ‘living together’ as stated in the explanatory memorandum accompanying the Bill can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’.⁷⁷ The Court was swayed by the French view that the face plays an important role in social interaction. It understood the view that individuals who are present in places open to all may not wish to see practices and attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships which by virtue of an established consensus forms an indispensable element of community life within the society in question. The Court therefore accepted the French argument that:

the barrier raised against others by a veil concealing the face is perceived by [France] as breaching the right of others to live in a space of socialisation which makes living together easier.⁷⁸

The Court found that it falls on the state to secure conditions such that individuals can live together in their diversity. The Court accepted that a State may find it essential to give particular weight to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places.⁷⁹

CONCLUSION: IDENTITY RIGHTS AND PERSONAL FREEDOM

Article 22 of the UDHR states that everyone is entitled to the realisation of the rights needed for one’s dignity and the free development of their personality.⁸⁰ At Article

⁷³ *S.A.S.* (n59) [113ff].

⁷⁴ *Ibid* [120].

⁷⁵ On this, see further J Marshall *Human Rights Law and Personal Identity* (Routledge 2014).

⁷⁶ *S.A.S.* (n59) [119].

⁷⁷ *Ibid* [121].

⁷⁸ *Ibid* [122].

⁷⁹ *Ibid* [141].

⁸⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

29, the Declaration states that “everyone has duties to the community in which alone the free and full development of his personality is possible”. It is therefore clear that the existence of a personality or identity does not ‘just happen’ or take place in a vacuum, without assistance, or support from, or interconnection with, other people. The realisation of one’s dignity and freedom of personality formation takes place in a social setting. John Eekelaar has argued that people have rights to the extent that their own identification of what enhances their well-being is socially recognised.⁸¹ This is premised on the capacity of the individual to have a genuine appreciation of his or her goals, and the assumption that the individual is fully competent and acting in conditions of freedom. In this analysis, the idea of human rights is said to be a central element in the development of an international morality.⁸² The object of rights is the identification of end states necessary to promote well-being:

[r]ights protect the well-being of the right holder. Well being includes . . . the opportunity to establish and maintain important personal relationships, the ability to benefit from educational, social and economic activity, to integrate into society and to achieve life plans.⁸³

Eekelaar observes that the language of rights is an instrument by which individuals claim the power to determine, themselves, what promotes their well-being. This implies an instrumental use of rights to lead to freedom. The object of respect, including self-respect, is an agent’s capacity to raise and defend claims discursively, or, more generally, an agent’s status as responsible. This capacity can only become a basis for self-respect if it can be exercised. The importance of rights in connection with self-respect lies in the fact that rights ensure the real opportunity to exercise the universal capacities constitutive of personhood. In Axel Honneth’s language, this means that the fullest form of ‘self-respecting autonomous agency’ can only be realized when one is recognized as possessing the capacities of legal persons: of morally responsible agents.⁸⁴ This recognition occurs by having in place a political and legal structure that enables meaningful choice and toleration of different viewpoints, in my view including different forms of dress, having appropriate conditions available to re-examine ways of life and projects.

We have plural identities but our ability to discern this and to choose what to make of the identities needs to be fostered by liberal democracies, not restricted through dress bans. On the cover of Mel Thompson’s *Art of Living* book entitled *Me* is a picture of a freestanding round bathroom mirror with the word ‘me’ written backwards. Other people, ‘the other’, will never see exactly who you are to yourself. They see a reflection, a representation, a persona. It is this fundamental problem that means we will never have our subjectivities fully protected by law. The law could be said to react to us as we present ourselves to be or as those in power perceive us to be. If focusing on how we present ourselves, this is mainly through our actions: our speech, our expressions, our movements, and other communications that others can see and feel and touch. However, the law tries to capture some sense of our unique individual identities. It has tried, through the use of anti-discrimination laws and through qualified rights. These show that through law’s introduction of objectivity, including a notion of ‘reasonable accommodation’, and the necessity to fit within certain ‘grounds’ of discrimination, the protection of the manifestation of our identity is incomplete and unsatisfactory. This is particularly so when one’s way of life, and form of dress, is not the same as that of the majority.

⁸¹ J Eekelaar, ‘Personal Rights and Human Rights’ (2002) 2(2) HRLR 181, 185.

⁸² *Ibid* 181.

⁸³ *Ibid* 185.

⁸⁴ A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press 1992), xv.

NO FACE VEILS IN COURT¹

FELICITY GERRY QC*

I can see serious difficulties with the idea that a witness should have her head covered where evidence is contested. If there is any question of credibility, it should be uncovered . . . The jury system works in this country by contested evidence being decided by witnesses giving evidence before a jury and having credibility weighed—and one factor taken into account is the impression the witness makes and that includes being able to see the witness's face.²

INTRODUCTION

In January 2016, Lord Neuberger, President of the Supreme Court indicated his view in the above quote that face veils should not be worn in court if evidence is contested.³ He had previously said in a speech that it was necessary to have some “understanding as to how people from different cultural, social, religious or other backgrounds think and behave and how they expect others to behave. Well known examples include . . . how some women find it inappropriate to appear in public with their face uncovered.”⁴ The speech was misreported and the 2016 news report was clearly an opportunity for him to clarify his views. The confusion arising from the media reports of his speeches and interviews perhaps indicates how vexed the issue of face veils has become⁵.

The current state of the criminal law appears to be that a face veil should be removed (by a witness or a suspect) when credibility is in issue. In tackling the issue of veiling on a case by case basis, it could be argued that the courts have failed to have regard to wider issues of women's empowerment by being veil free. Baroness Hale, Deputy President of the Supreme Court, has said that women giving evidence in court should do so without a face veil. She said she had come to this view when ordering a mother in a family court case to remove her veil in order to assess whether the witness was lying and now took the view that the same should happen in criminal cases. She suggested that judges should be able to insist that women reveal their faces to juries⁶. Recent cases have exposed reasoning based on open justice and social interaction that effectively conclude a full face veil is irrelevant when most evidence is given but can impeded decisions where the credibility of a witness or party is in issue. The question asked in this paper is whether, by accepting veiling, we are disempowering women by not seeing women in the legal process as we see men.

When the French ban on women wearing face veils in public was upheld in the European Court of Human Rights, Interior Minister Manuel Valls, from the Socialist Party was reported as saying “The law banning the full veil has nothing to do with Islam

*Queen's Counsel in London and Darwin and Chair of the Research and Research Training Committee in the School of Law at Charles Darwin University, Australia.

¹ Adapted in part from Felicity Gerry QC 'No Face Veils in Court' for Huffington Post UK December 2014. <http://www.huffingtonpost.co.uk/felicity-gerry/no-face-veils-in-court_b_6318766.html >

² F Gibb F., 'Veils Should Not Be Allowed in Court, Says Britain's Top Judge' (*Times Law*, 30th January 2016) <<http://www.thetimes.co.uk/tto/law/article4678373.ece>> accessed 26 April 2016.

³ *Ibid*.

⁴ Lord Neuberger 'Fairness in the Courts: The Best We Can Do' Address to the Criminal Justice Alliance 10 April 2015 <<http://criminaljusticealliance.org/wp-content/uploads/2015/04/The-Best-We-Can-Do-Lord-Neuberger-at-the-CJA-100415.pdf#page=9>> accessed 26 April 2016.

⁵ *Ibid*.

⁶ D Barratt 'Remove Muslim Veil When Giving Evidence in Court, Says Top Woman Judge' (*The Telegraph*, 12th December 2014) <<http://www.telegraph.co.uk/news/uknews/law-and-order/11290365/Remove-Muslim-veil-when-giving-evidence-in-court-says-top-woman-judge.html>> accessed 26 April 2016.

but it is a law liberating women.”⁷ There is no blanket ban on the face veil in England and Wales and this paper does not seek to argue that there should be, but courts and tribunals have had to consider what to do when a woman wishes to give evidence in court wearing a face veil.

Much has been written about the wearing of a face veil generally from a religious and feminist perspective by those both for and against the practice. However, almost nothing has been said about the defendant’s right to a fair trial. That right should not easily be waived. The current state of the law is that a balancing exercise must be applied. The balance seems to be that veils can be accommodated save for where credibility of a witness or party is in issue. This paper recognises that the issues are complex and that, subject to raising concerns over sanction, the current approach is proportionate. However, a preliminary argument is raised regarding the wider issues at stake in relation to gender equality which have not, as yet, been addressed. It is axiomatic that there should be a recognition of rights in the context of sisterhood and in the context of religious recognition but, on a practical level, perhaps the most frightening future for women is not whether women are to be veiled, but a formal justice system where the experiences of women are undervalued or simply ignored as they were in the past⁸. Important work has been done over recent generations to give women access to justice and accommodate the needs of vulnerable women. This has necessitated recognition of culture and beliefs. It is not suggested that this work should be undone, only that we consider the wider issue of visibility of women as an empowerment issue.

The issue of the full face veil in legal proceedings in England and Wales, therefore, gives rise to major issues including gender equality, religious observance, open justice and social interaction. Ultimately, this paper concludes that there can be headscarfs but there should be no face veils in court. This is not a position that is arrived at easily, nor is it a position that should or can be achieved immediately as much work still needs to be done to ensure that women are protected and empowered by being able to achieve justice – whether as victims or as accused. However, this paper seeks to begin a new conversation as part of the wider discourse on how women can be seen to be treated equally and with respect in justice systems.

GENDER EQUALITY AND RELIGIOUS OBSERVANCE

It is important to remember that women who wear a headscarf for religious reasons have been discriminated against and subject to life changing barriers in the context of education, work and citizenship.⁹ Vilification is particularly intense in the current climate but it is not new. Famously it affected the ability of an elected MP, Merve Kavakci, to sit in the Turkish Parliament and, for a while, her headscarf was displayed in the US Capitol as representative of the struggle for democracy and religious freedom.¹⁰ The ban on headscarves in the Turkish Parliament was eventually reversed.¹¹ Conversely, for many the headscarf is a symbol of fundamental religious beliefs which disempower women

⁷ Hajer Naili ‘Euro Court’s Ban on French Veil is Biased’ (*Women’s eNews*, 4 July 2014) <<http://womensenews.org/story/religion/140703/euro-courts-ban-french-veil-biased>> accessed 20 April 2016.

⁸ A Gorst *Modern British History: A Guide to Study and Research* (I.B. Tauris and Co, 1997) 24.

⁹ National Consultation with Arab Muslim Australians after 9/11 and the Bali bombings: Australian Human Rights Commission, *National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, chpt 2 <<https://www.humanrights.gov.au/publications/isma-listen-chatper-2>> accessed 20 April 2016.

¹⁰ Richard Peres *Headscarf: The Day Turkey Stood Still* (Garnet Publishing 2013) 1–3

¹¹ Female MPs Attend Turkey Parliament In Headscarves (*The Telegraph*, 23rd November 2013) <<http://www.telegraph.co.uk/news/worldnews/europe/turkey/10417620/Female-MPs-attend-Turkey-parliament-in-headscarves.html>> accessed 20 April 2016.

and create conflict in modern secularist society.¹² It is in this context that secularism becomes as achingly fundamentalist in its pursuit, as are those who are fundamental about religion. The problem with any fundamental stance is that there is an inevitable loss of perspective and entrenched approaches can lead to injustice. Even the Sikh turban has been mistaken for Muslim headdress worn by male elders which has led to conflict, despite both being worn to reflect piety.¹³ However, save for an extremely unlikely situation where hair or head shape is in issue which cannot be dealt with by out of court agreement, there can be no possible or sensible objection to a female witness or party wearing a headscarf in court, just as religious hats have long been accepted in courts in more than one country and for more than one type of hat.¹⁴

The issue of face veiling is a more difficult challenge but is debated in the same space. The burqa is simultaneously viewed as undermining freedom and empowering for religious women.¹⁵ It is an even more potent symbol for the debate surrounding patriarchal and modernist societal discourse and the challenge that arises when religion meets secularism in a public context.¹⁶ It is against this background that the courts in England and Wales have to consider how to facilitate women with religious beliefs to give evidence, how to ensure vulnerable women in certain communities can be empowered to engage in the court process and how evidence can be received from women as witnesses or parties where they would normally cover their faces in public. This short paper looks at the issue from the perspective of a court dealing with women who, for religious reasons, wish to keep their faces covered.

Legal developments can contribute to our conceptual understanding of women's religious subjectivity and agency, and the framing of women in religion in relation to veiling. Against this background, one can question whether women are empowered by not following a predictable path or not receiving religious instruction in schools where scriptures from most religions were written at a time when women were perceived as property. Conversely, there is concern that the ban on the face veil in France has led to women from certain communities being hidden from view altogether and not taking part in French society at all with the consequent inability to access support that comes from access to justice. These are issues which engage fundamental human rights for women. The Universal Declaration of Human Rights (UDHR) preamble recognizes that "the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world".¹⁷ It creates a commitment to participate in and contribute to the formation of unity among nations. That unity is founded not on religious or cultural hegemony but by achieving a harmonized ideal. Religious freedom is recognized in Article 18 which provides that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with

¹² (n9).

¹³ Why Do Sikhs Wear Turbans? (*NUS website*, 26 November 2014) <<http://www.nus.org.uk/en/advice/health-and-wellbeing/why-do-sikhs-wear-turbans/>> accessed 20 April 2016.

¹⁴ Georgia Judge 'OK, You Can Wear that Weird Muslim Hat in my Courtroom' (*Bad Lawyer NYC Blog*, 2011) <<http://badlawyernyc.blogspot.com.au/2011/05/georgia-judge-ok-you-can-wear-that.html>> accessed 20 April 2016, and see 'Judge Regrets Rasta Row' (*BBC News*, 30 May 2002) <http://news.bbc.co.uk/2/hi/uk_news/england/2016325.stm> accessed 21 April 2016.

¹⁵ Caroline Spelman 'Wearing The Burka Can Be Empowering' (*The Telegraph*, 19 July 2010) <<http://www.telegraph.co.uk/news/newstopping/religion/7897848/Caroline-Spelman-wearing-burka-can-be-empowering.html>> accessed 21 April 2016.

¹⁶ Samia Bano 'In the Name of God? Religion and Feminist Legal Theory' in M Davies and V E Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 157–158.

¹⁷ Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) [Preamble].

others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The articles of the UDHR apply equally to women and men. The right not to be discriminated against on grounds of gender is addressed in Article 2, which reads:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The freedoms and rights expressed in the Declaration include the right to equal pay for equal work, the right to education, the right to health and the right to participate in, and influence the development of, society. In the European context, Article 9 of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”) also protects religious freedom as follows:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

This is not an absolute right, as by virtue of Article 9(2):

Freedom to manifest one’s religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others.

Much ink has been spilled on whether the wearing of a veil or not fits within the noted exceptions but the wider question here – whether veiling is a gender equality issue – can start to be seen when one notes that the European Court of Human Rights has recently proclaimed gender equality as one of the key underlying principles of the Convention. So it is that we can seek to consider whether religious observance is qualified where it conflicts with women’s empowerment.¹⁸

In the context of the veil it can be argued that the choice of a woman to assert her right to wear a face veil is not autonomous because the religious observance is essential within a particular community or because it is dictated by the woman’s inner conscience¹⁹. On the qualification of rights to veil, others raise the negative health consequences of full veiling and associated coverings as prolonged use affects gait and causes vitamin D deficiency.²⁰ However, significantly, research tends to show that Western perceptions about veiling are far removed from the perceptions of those who veil and the meanings attributed to veiling are culturally, contextually and individually assigned.²¹ There are some dangers in making assumptions about an inner belief based on outer characteristics.²² However, what cannot be ignored is the simple fact that men with the same religion, whilst also interpreting their scriptures as a requirement to dress modestly, are not required to cover their faces. The niqaab and burqa are not the choice of garb for

¹⁸ Ivana Radacic ‘Gender Equality Jurisprudence of the European Court of Human Rights’ [2008] 19(4) European Journal of International Law 841.

¹⁹ Emmanuelle Bribosia & Isabelle Rorive ‘Insider Perspectives and the Human Rights Debate on Face Veil Bans’ (Working Paper 2014/2, Centre Perleman de Philosophie du Droit 2014) <http://www.philodroit.be/IMG/pdf/ir_eb_-_insider_perspectives_-_2014-2.pdf> accessed 21 April 2016.

²⁰ Daniel Pipes ‘Niqabs and Burqas as Impediments to Health’ (*Daniel Pipes Middle East Forum*, 5 February 2001) <<http://www.danielpipes.org/blog/2001/02/niqabs-and-burqas-as-impediments-to-health>> accessed 21 April 2016.

²¹ S Hochel ‘To Veil or Not to Veil: Voices of Malaysian Muslim Women’ [2013] Intercultural Communication Studies XXII (2) 40 <<http://web.uri.edu/iaics/files/Sandra-Hochel.pdf>> accessed 21 April 2016.

²² (n19).

men and accordingly, on that simple fact, one can conclude that there is gender inequality which does not arise in the same way as a headscarf. In reality the solution to female empowerment is never achieved on simple facts. Clothing is a particularly vexed topic as some societies force women to wear specific attire under the pretext of preserving cultural authenticity and national identity and other societies effectively force women not to wear specific attire to protect the character of secular society.²³

There are practical and philosophical tensions: Does building and protecting civil society institutions improve the status of women. Do such development goals achieve greater equality than relying on legal reform? Should there be increased representation of women in judicial, legislative and executive bodies and, if so, how is this achieved? These are questions which are being given serious thought in the Qur'ānic, interpretive, and legal traditions context.²⁴ In deciding what constitutes a legitimate aim in this context, this paper suggests women's participation in all aspects of court processes is a priority.

THE CRIMINAL TRIAL

In the context of a given criminal trial, the court may be faced with a woman who is perfectly confident in asserting her religious rights or at the other end of the spectrum, has suffered disempowerment within her community and the court risks adding to her burden by questioning her religious faith. What ought to be permissible and what sanction can and should there be for a woman who refuses to remove her face veil are not straight-forward questions and it is difficult to find an overall solution. This is not an issue of anonymity which has already been dealt with by screening witnesses and using audio but relates to known witnesses and parties. In the most serious of cases a witness may well be vulnerable and traumatised and fearful of giving evidence. Requiring removal of a face veil in public could mean that the witness or party becomes incapable or unwilling to give evidence and outcomes could be detrimentally affected. The stakes are high. There are other evidential issues which may also arise. For example, in relation to defendants who have bad character, sometimes the open display of religious devotion can be an expression of good character. In court however the overarching question appears fairly straight forward: How to achieve a fair trial for both the prosecution and the defence? Judges have to enable witnesses to give their best evidence and juries need to be able to assess those witnesses properly. There are also other actors in courts who may be religious – judges or court staff or jurors. The issue of veils in court is so much wider than the credibility of an individual.

There is guidance available for judges. In 2007 the Equal Treatment Advisory Committee of the Judicial Studies Board (the JSB) published guidance on the wearing of the Niqab, the full veil worn by Muslim women. Summarising the guidance, the Chairman of the Committee, Mrs Justice Cox, stated:

At the heart of our guidance is the principle that each situation should be considered individually in order to find the best solution in each case. 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. If a person's face is almost fully covered a Judge may have to consider if any steps are required to ensure effective participation and a fair hearing – both for the woman wearing a Niqab and for other parties in the proceedings. This is not an issue that lends itself to a prescriptive approach – we have drawn on a wealth of cases

²³ Ahmed E. Souaiaia *Contesting Justice Women, Islam, Law, and Society* (State University of New York 2008).

²⁴ (n20).

that demonstrate that and we have drawn up guidance for different court personnel and parties.²⁵

More recently in *AAN (Veil)*, the Upper Tribunal (Immigration and Asylum Chamber) vitiated a decision by the Lower Tribunal where the substance of the witness's evidence was ignored because she was veiled and her identity could not apparently be verified²⁶. It is important to note that the Upper Tribunal sat before the decision in *S.A.S. v France* which upheld the French on face coverings in public²⁷. Nonetheless it is necessary to discover the reasoning behind the decision.

Referring to the relevant human rights discourse and decided cases together with the 2006 interim advice to Tribunal judges by Hodge J and the 2007 JSB guidance, the President, Vice President and Upper Tribunal Judge Grubb took the view that there is a rebuttable presumption that if a representative who wishes to wear a veil "has the agreement of his or her client and can be heard reasonably clearly by all parties to the proceedings, then the representative should be allowed to do so". However, if a Judge or other party to the proceedings is unable to hear clearly, then the interests of justice are not served and "other arrangements will need to be made". The Upper Tribunal applied the same reasoning to witnesses and parties and noted that the JSB guidance "emphasises that where witnesses and parties are concerned: A sensitive request to remove a veil may be appropriate". However, they went on to voice concerns about that approach:

this requires careful reflection, since attending court can be a daunting experience for many and the ability of a witness or party to give their best evidence should not be compromised. Experience demonstrates that evidence can be given effectively without removing one's veil. Where the issue is raised, a short adjournment may be appropriate to enable the woman concerned to reflect and, perhaps, to seek guidance or advice. Ideally, any issue of this kind should be addressed at the outset of the hearing. The latter recommendation clearly places some responsibility on legal representatives. The guidance repays full reading and we would urge all Judges of both Tiers to study it.²⁸

The Upper Tribunal had a number of decisions to assist. In *Eweida and Others v United Kingdom*²⁹ the European Court of Human Rights awarded damages to an British Airways employee who had been required by her employer not to display a religious cross, ruling that this was a disproportionate measure in pursuit of the employer's legitimate aim of having and enforcing a uniform policy but dismissed a similar claim brought by a nurse against a hospital authority where the legitimate health and safety aim of the employer prevailed. In the context of manifestation of religion, the House of Lords held in *R (Begum) - v- Head Teacher and Governors of Denbigh High School*³⁰ that a school's refusal to allow a pupil to wear a Jilbab at school did not interfere with her right to manifest her religion and alternatively that any interference was objectively justified under Article 9(2) ECHR and also in *R (Playfoot) v Millis School Governing Body*³¹ where the High Court held that a school's refusal to permit a pupil to wear a purity ring as an expression of her Christian faith and affirmation of her belief in celibacy before marriage did not infringe Articles 9 and 14 of the Convention³².

²⁵ *AAN (Veil)* [2014] UKUT 102 [11].

²⁶ *Ibid.*

²⁷ Application no.43835/11.

²⁸ (n24).

²⁹ Application nos. 48420/10, 59842/10, 51671/10 and 36516/10.

³⁰ [2006] UKHL 15.

³¹ [2007] EWHC 1698 (Admin).

³² (n24) [13].

So the Upper Tribunal concluded that the issue must be approached on a case by case basis. This is the approach that has been generally taken³³. Each court is tasked with ensuring that any restrictions are necessary and proportionate having regard to freedom of expression and freedom of religion to ensure there is no negative impact on the exercise of women's human rights. However, the rationale that can be gleaned from the decisions overall in relation to court proceedings is that the decision depends on whether the witness gives evidence on a fact in issue and then whether the witness's credibility is in issue. Baroness Hale's case involved a potentially dishonest witness. The Upper Tribunal decision related to a case where the lower court had not even begun to consider what relevance the witness evidence would have. In all cases that have been reported there has been no real issue about the strength of the witness's religious beliefs.

The decisions for courts to make are inherently practical having regard to the legitimate aims. In *SAS*, the European Court of Human Rights held that the ban "was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face". A court statement also said the ruling also "took into account the state's submission that the face played a significant role in social interaction".³⁴ So, in deciding how to approach the evidence of a witness or party in a court, regard must be had to social interaction and the legitimate aim of the court process which together relate to the presentation of relevant evidence without engaging in the wider issues of gender equality, religious requirements or the empowerment of women.

OPEN JUSTICE AND SOCIAL INTERACTION

Open justice is one of the fundamental attributes of a fair trial. The rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances.³⁵ Lord Woolf in *R v Legal Aid Board ex p Kaim Todner* expressed the reasoning behind the common law tradition:

The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.³⁶

³³ See also *SL v MJ* [2006] EWHC 3743 (Fam).

³⁴ European Court of Human Rights 'French Ban on the Wearing in Public of Clothing Designed to Conceal One's Face Does Not Breach the Convention' (Press release, 1 July 2014) <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/01_07_14_grandchamber.pdf> accessed 20 April 2016.

³⁵ *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

³⁶ [1999] 1 QB 966.

The Upper Tribunal in *AAN (Veil)*³⁷ had regard to what open justice means and how to achieve a fair trial:

This principle is engaged in circumstances where facial religious attire arises as an issue demanding of a solution. The screening of a party or witness or the imposition of restrictions on the courtroom audience are both measures which impinge on this principle. Where a court or tribunal is contemplating a derogation from this principle, it will be guided by two landmark decisions of the House of Lords and, in particular, the related principle that derogation is permissible in furtherance of the protection of the administration of justice. See *Scott -v- Scott* [1913] AC 417 and *Attorney General -v- The Leveller Magazine* [1979] AC 440, where Lord Scarman stated: “To justify an order for hearing in camera, it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.”

And per Lord Diplock in the same case:

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest. Where a Court in the exercise of its inherent power to control the conduct of proceedings before it, departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the Court reasonably believes it to be necessary in order to serve the ends of justice.

So, achieving open justice does not mean completely open courts. There can be adaptations and the balancing exercise depends on what the issues are. If a witness or party wishes to be screened from male counsel this can be achieved but, not from a male jury member who has to assess her evidence. In a criminal trial, the balance is in favour of selecting jurors and court officials regardless of gender or race or other diversity issues so, to remove men because one witness has sensibilities about giving evidence in the presence of the opposite sex would fundamentally skew the proceedings and would therefore be inappropriate. Public galleries can be cleared, save for court reporters and use of technology is entirely possible but, fundamentally, in England and Wales, the social interaction in court is both aural and visual – a completely blind jury would not be appropriate although an individual can be accommodated as they have the advantage of 11 other members. Whilst recognising that a witness or party hidden by a face veil cannot be fully assessed when giving evidence, the Upper Tribunal still encouraged attention to the content of the evidence. Ultimately the Upper Tribunal was dealing with a witness not a party and, although it involved serious issues, it did not involve a defendant in a criminal trial. Some might suggest that if it is a witness who gives peripheral evidence and wishes to be veiled that is very different from a defendant whose liberty is at stake. However, if the face veil wearer is a witness, is it fair to the defendant for her to hide? If she is a defendant, does her account of events need to be seen for a verdict to be safe? In most cases, if credibility is not in issue then arguably it is not necessary for the face of the witness to be seen. This would, for example, enable witness evidence to be taken by telephone without regard to their appearance.

In criminal cases, the most recent decision comes from a Crown Court ruling on the 16 September 2013 when His Honour Judge Peter Murphy gave judgment at Blackfriars Crown Court in *The Queen v D(R)*³⁸ on whether the defendant could wear a niqaab

³⁷ [2014] UKUT 102.

³⁸ Judgment of H.H. Judge Peter Murphy in relation to wearing of Niqaab by defendant during proceedings in Crown Court <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/The+Queen+-v-D+%28R%29.pdf>> accessed 21 April 2016.

throughout the trial. He decided that she could remain covered in the dock but the jury should have the opportunity to see the defendant's face uncovered when she gave evidence. At an early hearing the defendant appeared wearing a face covering that she declined to remove saying that she could not reveal her face in the presence of men for religious reasons. The judge took time to consider the matter. He received skeleton arguments from both parties and heard oral argument on an adjourned date. He also received an expert report from Professor Susan Edwards, an expert witness on Gender and Islamic Dress, which was prepared on behalf of the defendant. It is at times like this we can see the real value of professional advocates and a skilled judiciary. Again, the focus was on the evidence to be given and the issues at hand. At a hearing on 12 September 2013, the defendant was identified by means of evidence from a female police officer who was able to say that she was certain that the person before the court was in fact the defendant, not an imposter. On the face veil issue, His Honour Judge Murphy, quite rightly, recognised that the human rights issues involved were not merely a question of "judge-craft" but important questions of law to be balanced during the trial process. He said: "Given the ever-increasing diversity of society in England and Wales, this is a question which may be expected to arise more and more frequently, and to which an answer must be provided". At all times, the decision approached the issue on the basis that the wearing of a face covering in these circumstances was a genuine and sincerely held belief by the defendant but the governing basic principles were freedom of conscience, freedom of religion, and freedom of religious expression and an obligation to respect the court.

Judge Murphy gave primacy to the rule of law and the principle of open justice and the adversarial system:

If a fair trial is to take place, the jury (and for some limited purposes, the judge) must be able to assess the credibility of the witnesses – to judge how they react to being questioned, particularly, though by no means exclusively, during cross-examination. If the defendant gives evidence, this observation applies equally to her evidence. Moreover, juries properly rely on their observation of the defendant, not only when she gives evidence (if she does so) but throughout the trial as all the evidence is given. Adversarial trials have always depended in part on these conditions being present in the courtroom.

Here we can see similar reasoning to that applied in the later decision in *S.A.S.* which was effectively decided on the issue of social interaction. It is of note of course that the very issue in the trial in *The Queen v D(R)*³⁹ was whether the defendant had perverted the course of justice so, hiding her face may well have been of a distinct disadvantage and the judge was clearly doing his best to enable her to give her best evidence to the jury and not have her case decided on prejudice based on her religious beliefs. He set out his directions for the rest of the trial at paragraph 86 as follows:

- (1) The defendant must comply with all directions given by the Court to enable her to be properly identified at any stage of the proceedings.
- (2) The defendant is free to wear the niqaab during trial, except while giving evidence.
- (3) The defendant may not give evidence wearing the niqaab.
- (4) The defendant may give evidence from behind a screen shielding her from public view, but not from the view of the judge, the jury, and counsel; or by means of a live TV link.
- (5) Photographs and filming are never permitted in court. But in this case, I also order that no drawing, sketch or other image of any kind of the defendant while her face is uncovered be made in court, or disseminated, or published outside court.

³⁹ *Ibid.*

It has been noted that the directions are similar to “compromise” positions reached in the Canadian case of *R v NS*⁴⁰ and the New Zealand case of *Police v Razamjoo*,⁴¹ but close examination reveals that courts generally focus on facilitating evidence in the most suitable way for the witness but with regard to the importance of the evidence to the case as a whole. In *The Queen v D(R)*⁴² however, the decision effectively removed the defendant’s right to give evidence. In the end she decided to plead guilty so the question of whether the decision was proportionate in tying her choice of clothing to her choice to enter the witness box has never been tested. Whilst the judge concluded that “the principle of openness ensures that the courts and the trial process belong to all regardless of religion, gender or origin”, it is a decision which prevents a woman’s evidence being heard, which is concerning.

It is unfortunate that there is no definitive guidance to support the suggestion that a court, whilst public, is not a public place for the purposes of religious observance – an interpretation of scriptures to allow evidence to be given unveiled would be of great assistance but, in the meantime, the decision in *The Queen v D(R)*⁴³, if routinely followed, means a female defendant needs to be seen so that we can be sure she has a fair trial, in the sense that a tribunal of fact has the best opportunity to assess her evidence. This may be because the evidence of a defendant is invariably under challenge. In the context of vulnerable witnesses, guidance already exists that advocates should treat witnesses for the prosecution or the defence with dignity and respect and it also follows that, in such cases, the judge should not impose his / her own beliefs on a jury when giving legal directions. The aim is for religious belief to be respected but to achieve fair trials the process is effectively secular, with one potential exception – if social interaction and open justice are the only criteria, in principle, a female juror can watch a trial without removing her face veil so that belief does not become a reason to avoid public duty.

Those who are affected by a secular court process should be informed in advance that judges can require the removal of face veils. Hopefully proper preparation will demonstrate that beliefs are respected so that witnesses do not refuse to attend and defendants give evidence, when it is in their best interests to do so. Special measures can be applied to include the clearing of the public gallery and screening from a male defendant. Less crucial witnesses who are committed to wearing a face veil could make use of technology by use of pre-recorded video evidence, TV link or even telephone evidence. Pressure on courts for time should not affect the need to enable the court to hear the best evidence but the main protagonists should give evidence and be tested, in person, in open court.

CONCLUSION

In the end the balance currently being struck is between the rights to an expression of religion and the legitimate aims of the court; namely open justice and social interaction. However, women must be seen not merely to have their evidence assessed but also as equal members of society enabled to participate fully in the justice system. This may well not be achieved by refusing to allow a woman to give evidence. Breach of a court order is generally dealt with by way of contempt proceedings rather than preventing an individual from giving evidence. We should not remove a right to give evidence based

⁴⁰ 2012 SCC 72, [2012] 3 S.C.R. 726.

⁴¹ CRN 30044039397–8, 17 January 2005.

⁴² (n37).

⁴³ *Ibid.*

on what someone is wearing, particularly when it is targeted at a woman. There is a need to uphold open justice and to enable social interaction in a court setting by the best and most appropriate methods of securing evidence. However, in the absence of any legislative decision on court procedure, further guidance is sorely needed on the question of sanction for remaining behind fabric. Baroness Hale may well be right to suggest we insist on veil removal in court but we need to be clear on the reasons and the outcomes.

So, we see that the courts have side stepped the issue of women's empowerment in the context of religious observance and applied a presumption that deals solely with the mechanics of the court process. Ethical and moral guidelines are ever present when individuals and organizations provide direct services to their charges⁴⁴. This paper suggests that giving primacy to gender equality (in the sense of equal recognition in society) is more important than a qualified right to religious observance, particularly where that observance may well be capable of being fulfilled with a headscarf.. Women are disadvantaged in every walk of life, whatever religion they observe⁴⁵. National and international obligations are clear and religious or cultural relativism inhibit women's progress⁴⁶. Hard roads have been travelled for women's evidence to be heard in court at all and often it comes on the most sensitive of issues. Veiling adds to the burden so, tackling it as an issue is not something that needs an immediate solution. There is a need to uphold open justice and that social interaction in the sense of presenting evidence to be assessed is important. However, the conclusion that this paper reaches is that whilst courts can assess whether seeing witnesses give evidence is more important than enabling people to observe their religion, there is an even greater need for women to be seen and heard in court on an equal platform. In this sense the discourse surrounding visibility and perceptions of women is far from over, regardless of religion.

⁴⁴ (n21).

⁴⁵ Australian Centre for Leadership for women Articles in Category *Panel on the Concerns of Women Experiencing Disadvantage* <<http://www.leadershipforwomen.com.au/transform/activism/panel-on-women-experiencing-disadvantage>> accessed 21 April 2016.

⁴⁶ See: Graeme Reid, *The Trouble With Tradition When "Values" Trample Over Rights* (Human Rights Watch world report, 2013) <<https://www.hrw.org/world-report/2013/country-chapters-1>> accessed 21 April 2016.

FACE VEILS AND THE LAW: A CRITICAL REFLECTION

SAMANTHA KNIGHTS*

INTRODUCTION

The face veil (or niqab) generates a remarkable amount of media attention. Public debate was re-ignited in the UK in 2010 by France passing legislation to ban the concealment of the face in public places.¹ Although the law is neutrally drafted it was drafted with the principal aim of banning the Muslim face veil in public.² The law was challenged by a French Muslim who wished to wear a face veil in public places. She lost both before the domestic courts and in the European Court of Human Rights in 2014, which found no violation of the ECHR and accepted the argument of the French government that the law was based on a “certain idea of living together”.³ The Telegraph hailed the French law with the following headline: “France’s burka ban is a victory for tolerance”.⁴ But what is tolerant about a law preventing a woman from wearing a face veil if she chooses whilst walking along the street? A woman wearing a hijab or a face veil in a public place causes no physical harm to anyone; although conversely they may experience much discrimination, abuse and negative treatment for so doing.

As always a significant proportion of the debate emanates from individuals who will never wear or have never worn any form of Islamic head or face covering. There is nothing wrong with anyone expressing a view; however the fact remains that the voice of the veiled woman is rarely heard in the media. Frequently assumptions are made on her behalf, rooted in generalisations, and stereotyping. She typically becomes either a coerced and subjugated woman who has fallen prey to her male family members and/or extreme religious doctrine, or at the other extreme a strong willed woman exercising a free choice. The reality is much more complex with as many views and reasons for choosing a face veil as there are women who do so, including it being a reaction to insensitive Western governments, a fashion statement, and a symbol of religious freedom.

The seminar at Nottingham Trent University was organized against the backdrop of the French legislation and the *SAS v France* decision. I assumed of course that at least one of the speakers would be a woman in a face veil. We were told that, not through want of trying, they had been unable to locate such a person. Did it matter that such a person was not there? It seemed an uncomfortable omission at the least whilst no fault of the organisers, given that the counter view was given at the outset by Yasmin Alibhai-Brown, a high profile journalist who has published her views against Muslim women wearing face veils for many years.⁵ Alibhai-Brown accepts that there are myriad reasons for wearing the veil and that many of her friends do. She questions whether their choice, even if independently made, was fully examined. For her, a Muslim woman, the

*Samantha Knights is a barrister at Matrix practicing in the areas of public law including refugee and prison law and commercial law. She has a particular interest in law and religion, and is the author of *Freedom of Religion, Minorities, and the Law* (OUP 2007).

¹ *Loi interdisant la dissimulation du visage dans l'espace public* is an Act of Parliament passed by the French Senate on 14 September 2010 and came into force on 11 April 2011. A similar law has also been passed in Belgium and upheld by the Belgian Constitutional Court.

² *SAS v France*, Application no. 43835/11, 1 July 2014, see [15]-[27] for the legislative history.

³ *Ibid* [121]-[122], [142].

⁴ William Langley, 'France's burka ban is a victory for tolerance', *The Telegraph* (London, 12 April 2011).

⁵ See e.g. Y. Alibhai-Brown, 'As a Muslim Woman, I See The Veil As A Rejection Of Progressive Values', *The Guardian* (London, 20 March 2015) <<http://www.theguardian.com/commentisfree/2015/mar/20/muslim-woman-veil-hijab>> accessed 20 April 2016.

veil is loaded with negative symbolism and represents both “religious arrogance and subjugation”. I understand the reasons for her view and am sympathetic to many of them. But ultimately, I do not think that face veils per se are the most important issue in tackling an underlying problem of women’s subjugation. Nor do I think that a blanket ban is the way forward, a view which she in fact herself also expressed at the seminar.

The voice of the veiled Muslim woman instead was provided through Dr Rajnaara Akhtar, a Muslim female academic (who wears a hijab in public) at Warwick University. She reported on the results of empirical study into the profile of women wearing face veils in the UK and their reasons for so doing. Unsurprisingly, the results revealed a myriad of reasons. But she did report the majority of women questioned were well-educated, rejected any notion of coercion on their decision, and viewed their decision as a personal religious choice. She also reported that the decision in a number of cases was not backed by the husbands or other male members of the family. Research amongst women in France has revealed similar findings.⁶ Whilst, one can always question whether findings are representative on the basis of the number of women interviewed, and their nationality, socio-economic status, and educational background etc., it appears uncontroversial that women wear veils for all sorts of reasons.

With that in mind I turn to consider two questions. Firstly, would a UK law similar to the one passed by the French Senate i.e. banning face coverings in public places, be compatible with the Human Rights Act 1998? And secondly, are there special situations e.g. at work or in education, where people may legitimately be requested not to wear face coverings.

COULD A BAN ON FACE COVERINGS IN PUBLIC BE JUSTIFIED IN THE UK?

As regards the first question, it is common ground that in the UK there is no and never has been any statutory provision preventing women from wearing face veils in public spaces. Here a woman is free to walk about, ride on public transport, visit a museum, and eat at a restaurant fully veiled and indeed covered from head to foot. Were such a statutory provision to be enacted it would need to be considered whether it were compatible with the Human Rights Act 1998 and with Article 9 ECHR (which protects freedom of religion and belief) in particular.

In terms of analyzing this right, if a woman says that she chooses to wear a face veil for religious reasons or regards herself as bound to wear it for religious reasons, that is sufficient evidence of a protected manifestation of religion or belief (i.e. in the terms of Article 9 ECHR) bearing in mind the clear steer by the House of Lords in the *Williamson* case⁷. As such at this stage complex issues of whether that choice is a genuinely free one or made through coercion in the absence of evidence to the contrary do not arise. Any law of the nature under consideration which prevents the right will be considered an interference. The real question is likely to be whether a ban can be justified.

There is always a balance to be struck between the manifestation of religion or belief and the interests of the state which are specified in Article 9 ECHR (interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others). Unless and until there is a genuine and sufficiently

⁶ See in particular Open Society Foundation, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France* (April 2011) <www.opensocietyfoundations.org/sites/default/files/a-unveiling-the-truth-20100510_0.pdf> accessed 21 April 2016.

⁷ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [46]-[50].

evidenced need for the democratic state to interfere in what women wear in public on one of these stated bases, there seems no reason to prevent her choice. As regards a general ban in public places it is likely that the last of the categories – namely the rights and freedoms of others would be in contention. This indeed was the base on which the ECtHR decided that the French law was justified. In so doing the Court, notably and in my view rightly rejected, the French government's arguments grounded on gender equality, human dignity and the fact that a majority of the French nation were said to be shocked by the face veil. Instead, the Court found that the notion of 'togetherness' which was relied on by the government was linked to the rights and freedoms of others. However, in my view the Court's reasoning is weak and the stated concept is far too nebulous and insufficiently evidenced such as to justify the ban even in France. Ultimately it is a decision which grants a wide margin of appreciation to the domestic courts.

However, context is of course all important and the nature of church and state relations in the UK is a very different to France. The UK is not a secular state – very far from it. It has an established church, bishops who as of right sit in the House of Lords, faith schools, a religious curriculum in schools with a Church of England bent, and a monarch who is head of the Church of England. Religious traditions (as with many states whatever the nature of their church-state relationship) underpin the fabric of many of our institutions from national holidays to the content of meetings, and dress codes in school and the workplace.

It is this Christian foundation which influences and shapes the fabric of so much of life in the UK which also has a part to play in ensuring that other religions have public space. It means that the state is not per se hostile to religion in the public sphere. Moreover, if the state itself funds religion in the public sphere e.g. Church of England schools, it would be unjustified discrimination not to grant state funding to schools of a different religious character. So in fact there is great religious plurality in the UK's public sphere. France, on the face of it, has a very different church-state relationship. It may be no less religious in terms of private religion, but it is set up as a secular state which in theory at least means there must be a complete separation between state and religion. French schools, unlike English schools, have no religious ceremonies subject to certain exceptions. Additionally, the UK has always accommodated considerable religious differences in its laws. It is not alone in this model which is followed to a greater or lesser extent by other democracies such as the US, Canada and Australia. To cite but a few but important examples of such pluralism in the UK there are statutory exemptions for Sikhs from wearing motorcycle helmets, or safety hard hats on construction sites. By law they may carry a dangerous weapon – a kirpan. Health and safety regulations for the slaughter of animals have carve outs for halal and kosher slaughter. Whilst female genital mutilation is outlawed, male circumcision is permitted in practice.

Looked at from this perspective, we see that in very many ways the UK has over many decades developed laws and practices which accommodate diversity rather than seek to require a homogenous assimilation of its population. In many ways that form of accommodation has been very successful. This view is not shared by all including certain French academics e.g. Olivier Roy but it is far from clear in light of events in France in the last decade that their model of 'assimilation' has had the desired effect either as Roy himself would also contend. The fact is that people are all different and individual and one of the most obvious manifestations of that is in the way in which we dress. Why should we unduly seek to interfere with this? As such the fact that the Strasbourg Court in one case was disinclined to interfere with the decisions of the domestic court in a completely different context, namely secular France, gives no

indication that similar legislation would be upheld by the Strasbourg Court for the UK. In my view there would be very considerable difficulties in trying to persuade the Court that ‘togetherness’ was a justifiable basis from the UK’s perspective.

The counter argument posits that although not all Muslim women are forced to wear face veils, a significant number are. In order to protect these women and ‘free’ them from the veil, it is necessary to ban it in public places. Another argument is that such women are being marginalized from mainstream society – they are likely to feel alienated and isolated at school, may find it difficult if not impossible to enter the mainstream workforce and create a barrier to integration in the community. There are many difficulties with these arguments being used to justify a ban on veils in public places in the UK. First, and most importantly there is scant if any evidence to show that a ban on veils here would be so justified and would have the desired effects. Whilst, it may indeed prevent women from wearing veils, there is no necessary and direct link between that and achieving integration in a community. If the aim is to re-integrate women, surely the focus should be on education, language, economic independence, and ensuring there is appropriate state support to deal with issues such as domestic abuse, forced marriage and coercion. Secondly, a ban may have the opposite effect of marginalizing women further if they are prevented from going out at all without a veil, an issue aired at some length by a number of the interveners in *SAS v France*. If consideration is to be given to the rights and freedoms of others, this must be considered from all angles including that of the consequences of legislation. Thirdly, a ban may reinforce divisions between different ethnic and religious groups, inflame religious sensitivities and in fact cause rifts in society where there were none previously. It may cause non-veil wearing Muslims to feel alienated, concerned about an unnecessary target on fellow Muslims. Fourthly, is the question of enforcement. If a woman does go out wearing a veil in order to buy food, take her children to school, visit a doctor or community group, what is the good of penalizing her e.g. by way of a fine. If the target is the coercive behaviour of a dominant male, it seems nonsensical to punish the woman. They will certainly be an easy target and may help crime statistics but what good would come of it?

It will be interesting to assess the impact of the ban in France and whether it makes France a more ‘together’ society. I somehow doubt it. At least one French academic who has studied its impact has declared the law a “total failure” and argues that it has encouraged both Islamophobia and Muslim extremism.⁸ Surely, taking a swipe at a piece of cloth in an attempt to tackle underlying issues of female subjugation, coercion by men, and in some cases domestic violence and abuse is not going to work. What is needed is a multi-agency assessment by education, social welfare, health care and employment focused groups to look at what might be achieved in terms of trying to improve the lives of coerced and abused women.

OTHER SITUATIONS

Turning to the second question is there any space in which Muslim women in the UK can legitimately be prevented from wearing face veils? The issue could or in some cases has already arisen in a number of specific contexts including pupils, teaching staff at state schools, and women giving evidence in courts.

As regards pupils in schools, in 2014 it was reported that Camden School for Girls, a state secondary school in London prevented a 16 year old from starting the sixth form

⁸ Ben McPartland, ‘Burqa Ban Five Years On – “We Created a Monster”’ *The Local* (Paris, 12 October 2015) <<http://www.thelocal.fr/20151012/france-burqa-ban-five-years-on-we-create-a-monster>> accessed 21 April 2016.

wearing a niqab.⁹ That decision does not appear to have been the subject of litigation. The decision of the House of Lords in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, will no doubt act as a deterrent to any pupils who wishing to challenge a school's decision to prevent them wearing a face veil, although each case must be examined on its specific facts. The school at the centre of the case already provided for a Muslim uniform acceptable it appears to every Muslim in the school save for the claimant. Significantly there was evidence from other pupils of a fear of being coerced into wearing more restrictive forms of dress were the *jilbab* permitted. It is not obvious that the balance would be struck in the same way for a sixth form with no specific uniform (as opposed to a dress code) and where a number of women in the school were in favour of her being allowed to wear the niqab. Different considerations may also apply for sixth formers as opposed to younger pupils.

As regards Muslim teachers in schools, this does not appear to be a widespread issue, at least not one reported in the media. At the same time an Islamic scholar, Dr Sheikh Hojjat Ramzy has aired his views publicly to argue that teachers should not be encouraged to wear the full face-veil in class; that young children need to see their teachers' facial expressions and that in his experience teachers usually removed the veil when teaching.¹⁰ In one case that did come before the Employment Tribunal it was held that there had been no discrimination or breach of rights in requiring a Muslim teaching assistant to uncover her face whilst teaching.¹¹ Account was taken of the negative impact on pupils if they could not see her – they might feel scared – and of the importance in terms of learning language to be able to see a teachers mouth and lips and eyes. It is not difficult to see on the evidence how the Tribunal reached the conclusion that it did in a case in which the best interests of children are in contention. Similar results may arise in a case involving anyone in a position of authority who wished to wear a face veil during their work e.g. a police officer, judge or NHS doctor or nurse. Quite aside from any issues surrounding identification and security, health and safety, there may be good reasons why the public should be able to see the face in terms of building trust, confidence, and transparency. Indeed a number of NHS Trusts have policies to effect that veils should not be worn by staff when in contact with patients.¹²

Different considerations, however, may prevail in the workplace when that person is not in a position of authority and indeed the NHS have indicated that a general ban on face veils is not necessary or proportionate.¹³ There doesn't seem to be a good case to be made against a woman wearing a veil whilst working in an office where she has no contact with the public during the course of her work. The fact that she might be associated with a particular company on entering or exiting the building should not tip the balance against wearing a veil. If anything the message should be that the employer promotes diversity in the workplace. A greyer area is whether the waitress in a restaurant, the barista in a coffee bar or the receptionist should be unveiled. Whilst it might be currently unusual in the UK to see a face veil being worn in such a situation,

⁹ See Joshi Herrmann 'Muslim girl banned for wearing niqab quits school as she is "too hurt to ever go back"', Evening Standard, (London, 24 September 2014) <<http://www.standard.co.uk/news/london/muslim-girl-banned-for-wearing-niqab-quits-school-as-she-is-too-hurt-to-ever-go-back-9752638.html>> accessed 20 April 2016.

¹⁰ John Bingham, 'No Need for Muslim Primary Teachers to Wear Full-Face Veil – Islamic Scholar' *The Telegraph*, (London, 12 November 2014) <<http://www.telegraph.co.uk/education/educationnews/11225736/No-need-for-Muslim-primary-teachers-to-wear-full-face-veil-Islamic-scholar.html>> accessed 21 April 2016.

¹¹ *Azmi v Kirklees Metropolitan BC* [2007] IRLR 434 (EAT).

¹² NHS Employers, *Wearing Face Veils In The Workplace* (19 September 2013) <www.nhsemployers.org/your-workforce/plan/building-a-diverse-workforce/need-to-know/wearing-face-veils-in-the-workplace> accessed 15 March 2016.

¹³ *Ibid.*

and again leaving aside arguments about security, health and safety, is it necessary in those situations for individuals to unveil?

As regards the issue of women wearing face veils in the courtroom, this is the subject of guidance by the Judicial Studies Board¹⁴ and also a number of decisions and has caused a certain amount of controversy. The guidance seeks to strike the balance between the rights of a woman to dress as they wish and the interests of the parties and the court to secure a fair trial. It states that the primary question at the outset is what is the significance of seeing the woman's face to the judicial task in consideration; and distinguishes between wearing veils as a judge, as a complainant and as a witness or defendant, and as an advocate. Previously the President of the AIT had promulgated his own guidance in 2006 focusing on the wearing of a veil by a representative. Neither guidance rightly adopted a prescriptive approach, but arguably also failed to provide a clear enough steer in the light of some subsequent cases before the court.

In these cases the court has been much exercised about issues such as whether it is possible to make a proper assessment of the veracity of a witness without seeing her face. In *SL v MJ Macur J* reasoned that the "ability to observe a witness's demeanour and deportment during the giving of evidence is important and, in my view, essential to assess accuracy and credibility".¹⁵ In that case a practical solution was found such that the petitioner removed her veil but was screened from the view of her counsel. In *R v D a Judge in the Crown Court (HHJ Murphy)* ruled that a defendant in a case would be able to wear a niqab throughout the trial, except when giving evidence.¹⁶ She would give evidence from behind a screen which would shield her from public view but not from the Judge, jury and counsel. He stated that the face veil was a hindrance to "openness and communication". In *AAN (Veil)* the Upper Tribunal allowed an appeal from the FTT in an asylum appeal where a key witness' evidence had effectively been ignored seemingly because she wore a veil.¹⁷ In 2013 The Lord Chief Justice, Lord Thomas, said there was a need for clear guidance on the issue following controversy over the *R v D* decision. The senior judiciary themselves appear to be divided on the issue. In 2014 Baroness Hale reportedly said that judges should be able to insist that women reveal their faces when giving evidence when necessary in order to gauge truthfulness, whilst the following year Lord Neuberger in a lecture to the Criminal Justice Alliance pronounced in favour of Muslim women appearing in court wearing a full-face veil.

It is worth examining the question of whether it is necessary to see a woman's face for the purpose of assessing truth in more depth. There is an overwhelming body of academic opinion and research based evidence which suggests that non-verbal behaviour including facial expression is an unsound basis for making assessments about the veracity of a witness.¹⁸ It should also be noted that a judge will never direct a jury to have regard to facial expression in their summing up. Senior English Judges have also cautioned against placing reliance on facial expression. The late Lord Devlin said:

I doubt my own ability . . . to discern from a witness's demeanour, or the tone of his voice whether he is telling the truth . . . For my part I rely on those considerations as little as

¹⁴ JSB, 'Choice, Inclusion and Wearing a Veil' 2007 Tribunals 10 <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Tribunals/trinunals_summer_2007_web.pdf> accessed 15 March 2015.

¹⁵ EWHC 3743 (Fam) [2006].

¹⁶ EWCC, 17 September 2013.

¹⁷ UKUT 102 [2014].

¹⁸ See a summary in Safoora Teli, *Niqab in the Courtroom* (Policy Brief, Avverroes) <<http://averroes.org.uk/wp-content/uploads/The-niqab-in-the-courtroom.pdf>> accessed 15 March 2016.

I can help. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of the particular witness.¹⁹

This conclusion was reached more recently by a Canadian Court:

Tone of voice, eye movements, body language and the manner in which the witness testifies, all important aspects of demeanour, are unaffected by the wearing of the niqab. Nor does the wearing of the niqab prevent the witness from being subjected to a vigorous and thorough cross-examination.²⁰

In summary it does not appear to be necessary in general for women giving evidence in a public court to remove their face veil. First, there is no cogent body of evidence to effect that judges/juries are unable to assess evidence adequately on the basis of hearing and seeing a witness. Secondly, there are and always have been many instances when the judge or jury or public will not be able to see a particular witness in person e.g. where witnesses give evidence behind a screen for national security reasons, child witnesses for their own protection, witnesses in cases of violent crime for their own protection. It is not suggested that there cannot be a fair trial in these cases. Thirdly, the fact that the public or jury might 'like' to see a face of a witness is not tenable as a justification. They are not on trial; they are not witnesses in the trial rather observers or jurors. Fourthly, in some cases it may be possible to accommodate the women by use of a private part of the hearing if she felt comfortable with removing her veil in court when press and public were excluded. All such options should be explored. Fifthly, and of considerable concern is the danger of excluding such women altogether from the process. On balance far more damage to the interests of justice is likely to be done if a key witness does not attend, or a complainant feels unable to bring a case or support a criminal prosecution. Sixthly, the number of women wearing face veils who may be potential witnesses is extremely small and is likely to remain so at least in the UK. It is practically extremely simple to accommodate them i.e. by allowing them to give evidence wearing a veil. Weighing everything into the balance I do not think that the interests of justice overall will be less well served by a requirement that the women remove her veil. To the extent that there are any issues around audibility these surely could be met by asking the woman to speak more clearly and loudly or by organizing a microphone.

For the reasons above I cannot also see any reason why an advocate should also be prevented from wearing a face veil in court. The most important attribute of the advocate is verbal communication; as long as she is audible there does not seem to be a necessity to see her face. The position of the judge may give rise to slightly different considerations as an individual in the public eye, and due to the importance of establishing trust and confidence in the judiciary. Given the increasing number of litigants in person in all court rooms, and in any event due to the indirect communication with the public, there may well be good reasons to ask a judge to remove her face veil when in court. However, I do not think the result in this situation is by any means clear cut. There would need to be a rigorous examination of all relevant considerations including what was in the best interests of justice.

CONCLUSION

In conclusion, the face veil means very many things to different people. At the same time it can be a symbol of repression, true religion, piety, freedom and diversity. Once it is

¹⁹ P. Devlin, *The Judge*, (OUP 1979) 63. Lord Bingham also distrusted heavy reliance on demeanour in the court room. See T. Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 10–11.

²⁰ See *R. v NS* [2010] ONCA 670 [73].

recognized that it cannot be assumed that the veil carries with it negative connotations for the public as a whole, then the starting point of discussions involving the veil shifts. In any event, in examining from a legal perspective whether any interference with a woman's right to wear a face veil is justified, there is generally no need to examine the issue of motivation for wearing the veil in any great depth. It is enough for the woman to demonstrate that it is a manifestation of her religious beliefs. The primary focus is on whether there is a need in a democratic society for the state to prevent a woman from wearing a face veil. As with all cases involving qualified rights, the evidence on both sides needs to be carefully considered and subjected to scrutiny. Whilst a general ban on face coverings in public is unlikely to be justifiable in the UK, there may be a limited number of special situations where it is appropriate to restrict veils such as in schools and in some employment situations. What is critical is that legitimate concerns about marginalization, discrimination, abuse and violence against women do not get misused as justifications for passing laws which might in fact make the situation of such women far worse.

THE VEILED LODGER – A REFLECTION ON THE STATUS OF *R v D*

JEREMY ROBSON*

At the time of writing this article (January 2016) some 28 months have elapsed since His Honour Judge Peter Murphy gave judgment in the case of *R v D*.¹ His judgment, requiring a female defendant of the Muslim faith to remove her niqaab if she wished to give evidence in her own defence, was lauded as a paradigm of common sense by some and, an unwarranted interference with protected rights by others. The conservative press celebrated the fact that the institutional supremacy of the court had been preserved² whilst the liberal press noted the judge had respected an individual's right to wear the veil for the remainder of the proceedings.³ Despite HHJ Murphy having reservations about circuit judges being seen to set a precedent and his request that the issue be clarified at a higher level, *R v D* appears to have become settled as a statement of principle. This article will suggest that the implications and unanswered questions of *R v D* are such that the failure of the senior judiciary or legislature to intervene is unsatisfactory and that guidance, based on a robust evidence base is necessary.

Background to R v D

The defendant in *R v D* was charged with witness intimidation and sent to be tried at the Blackfriars Crown Court. Her case was listed before HHJ Murphy for a Plea and Case Management hearing on 22 August 2013. She answered her bail dressed in a veil which covered the entirety of her face apart from her eyes.⁴ The judge requested that she remove her veil, but through her counsel, she declined asserting that her faith prevented her from revealing her face in the presence of men. The judge adjourned the matter to 12 September 2013 for both parties to file skeleton arguments on the issue. On 12 September the judge heard argument and considered an expert report on 'Gender and Islamic Dress' from Professor Susan Edwards. Having considered the issues the judge drafted a judgment, handed down on 16 September 2013, which provided directions for the remainder of proceedings. The judge acknowledged that requiring the defendant to remove her veil would amount to an infringement of her right to freedom of religion as protected by article 9 of the European Convention of Human Rights⁵ and, insofar as the majority of the proceedings were concerned, concluded that requiring her to remove her veil would be disproportionate to the aim to be achieved. However if the defendant wished to present her defence on oath to the jury, he concluded that the right of the jury to assess the defendant's demeanour outweighed her article 9 right and unless she removed her veil she would not be allowed to testify. In the event of her not testifying, the jury would be invited to draw adverse inferences as to her guilt. If she did remove her veil during evidence, screens would be erected so that her exposure to males who were unrelated to her was limited.

Following this ruling the case was adjourned for trial. The defendant did not testify at the trial and the jury were able to reach a verdict. They were subsequently discharged

*Barrister, Principal Lecturer in Advocacy, Centre for Advocacy, Nottingham Law School.

¹ [2014] 1 LRC 629.

² See for example, Telegraph View, 'Veils in Court are a Barrier to Justice' (*The Telegraph Online* 16th Sept 2013) <<http://www.telegraph.co.uk/comment/telegraph-view/10312765/Veils-in-court-are-a-barrier-to-justice.html>> accessed 25 September 2015.

³ Zoe Williams, 'Lifting the Veil. Do We All Have to Dance to UKIP's Tune?' (*The Guardian Online* 20th Sept 2013) <<http://www.theguardian.com/theguardian/2013/sep/20/zoe-williams-veil-niqab-personal-choice>> accessed 15th March 2016.

⁴ Hereinafter I shall refer to the 'veil' unless quoting directly as this approach dominates the writing in this area.

⁵ ECHR.

but, prior to the retrial, the defendant tendered a guilty plea to the indictment and proceedings against her co-defendant were dropped. The tendering of the plea extinguished any possibility of the case being referred for consideration of the Court of Appeal and so despite prompting much debate, the judgment has received no further review by the senior courts.

Media response to the judgment

HHJ Murphy's ruling divided opinion in both the popular and legal press. Many commentators were in favour of the ruling, primarily on the grounds that it upheld the fairness of the trial process. Gerry described it as 'common sense'⁶ and Hewson observed that "political statements of identity are all very well but they are not a basis to remodel our system of open justice".⁷ Some, including Rozenburg, argued that the ruling did not go far enough and expressed concern that the jury would be deprived of the opportunity to assess the defendant's demeanour as evidence was called against her.⁸ Other commentators felt the ruling was wrong with Gardner describing it as "mistaken in practical terms, wrong in liberal principle and wrong in law."⁹

Despite the concerns expressed about the judgment, there is some evidence that it reflects popular and professional opinion. A poll conducted by YouGov (commissioned by *The Sun* newspaper) indicated that between 70% and 85% of the public supported a ban on witnesses wearing a veil whilst testifying, and that between 76% and 88% believed that defendants should be made to remove the veil.¹⁰ Amongst the legal profession, a survey of over 400 barristers, commissioned by *The Times*, indicated that 91% favoured a ban on a defendant wearing veil whilst giving evidence.¹¹

Government and Judicial response

In delivering his ruling, HHJ Murphy expressed clear reticence at being the final arbiter of the issue. At paragraph 12 of his judgment he comments that:

The relegation of such important issues to the sphere of 'judge craft' or 'general guidance' has resulted in widespread judicial anxiety and uncertainty and to a reluctance to address the issue . . . Trial judges need, not only general guidance, however helpful, but a statement of the law. It is my intent to attempt to provide such a statement in this judgment, but as may be imagined, I do so with some misgivings. I am a male judge dealing with an issue which mainly affects female Muslim defendants, and does so in an intimate way; though I make clear at the outset that everything I say in this judgment is intended to apply to defendants of either gender and to those of any religious faith, or none, in analogous situations. I am conscious also of the place of the Crown Court in the hierarchy of legal authority, and I express the hope that Parliament or a higher court will review this question sooner rather than later and provide a definitive statement of the law to trial judges¹².

⁶ Felicity Gerry, 'No Face Veils in Court' (*The Huffington Post UK*, 15 December 2014) <http://www.huffingtonpost.co.uk/felicity-gerry/no-face-veils-in-court_b_6318766.html> accessed 14 January 2016.

⁷ B Hewson, 'Veils In Court – Should They Be Allowed?' (*Legal Week* 19th Sept 2013). <<http://www.legalweek.com/legal-week/blog-post/2295686/veils-in-court-should-they-be-allowed>> accessed 14 January 2016.

⁸ Joshua Rozenburg, 'Veils in Court: This Compromise Ruling Struck the Wrong Balance' (*The Guardian*, 17 September 2013) <<http://www.theguardian.com/law/2013/sep/17/veil-court-ruling-wrong-balance>> accessed 14 January 2016.

⁹ Carl Gardner, 'Even in a Niqab, The Defendant must be Heard' (*Head of Legal*, 19 September 2013) <<http://www.headoflegal.com/2013/09/19/even-in-a-niqab-the-defendant-must-be-heard/>> accessed 14 January 2016.

¹⁰ You.gov.co.uk, 'Most Still Want to Ban the Burka in Britain' (*YouGov: What The World Thinks*, 18 September 2013) <<https://yougov.co.uk/news/2013/09/18/most-still-want-ban-burka-britain/>> accessed 14 January 2016.

¹¹ Frances Gibb, 'Ban The Veil In Courts, Say Barristers' (*The Times*, 2 November 2013) <<http://www.thetimes.co.uk/tto/law/article3911405.ece>> accessed 14 January 2016.

¹² (n1).

Following his retirement from the bench he reiterated these views extra-judicially in a letter to *The Times* commenting that:

To leave the law uncertain risks conflicting and apparently arbitrary decisions. It is unfair to women who wear the veil, who have no way of knowing how they will be treated in a particular court or by a particular judge; and it is unfair to judges who are trying to make principled, consistent decisions.¹³

In the days and weeks that followed the ruling it seemed that his request for guidance would be met. On 29 September 2013, in an interview with the BBC, David Cameron indicated that, whilst opposing an outright ban, he would consider issuing new guidelines to judges telling them when they can ask people to remove the veil.¹⁴ He repeated this view again in January 2016.¹⁵ In response to a question asked at his annual press conference held on the 5 November 2013, the Lord Chief Justice announced that;

We consider the best way of dealing with this is to make a Practice Direction. The basic principle is that it must be for the individual judge to make his (or her own) decision but we will give clear guidance. We hope to be able to issue a draft for consultation in the very near future, and I do not want to anticipate, beyond what I have just said, what will go there.¹⁶

Following this, other members of the senior judiciary expressed, extra judicially, support for removal of the veil in court. In an interview with the London Evening Standard, Baroness Hale was reported as saying that “there must come a point where judges insist veils are lifted”.¹⁷ In 2015, a comment from Lord Neuberger that judges must have an “understanding as to how people from different cultural, social, religious or other backgrounds think and behave” was widely reported as indicating his support for the wearing of the veil in court.¹⁸ This prompted the Supreme Court to issue a response indicating that “Lord Neuberger would like to emphasise that he did not say that Muslim women should be allowed to wear a full-face veil while giving evidence in court.”¹⁹

Despite the obvious media interest in the subject matter, at the time of writing, the draft Practice Direction has not materialised. When questioned about it in his 2015 press conference, the Lord Chief Justice responded thus:

The current position is this. When I had the first of these two conferences two years ago, I thought I had a major problem on my hands. Actually, the last two years have shown that it is not a major problem. There have been no problems but we do have a number of other problems . . . so one would love to be able to do everything at once but that is not sensible.

¹³ Letter to *The Times*, 10 February 2016.

¹⁴ James Kirkup, ‘David Cameron Supports Muslim Veil Ban in Schools and Courts’ (*The Telegraph Online*, 29 September 2013) <<http://www.telegraph.co.uk/news/politics/david-cameron/10342501/David-Cameron-supports-Muslim-veil-ban-in-schools-and-courts.html>> accessed 14 January 2016.

¹⁵ Dominiczak and Swinford, ‘David Cameron Backs Bans on Muslim Face Veils as Tories Plan Crackdown on Gender Segregation’ *The Telegraph* (18th January 2016); ‘David Cameron: I Will Back Schools and Courts which Ban Face Veils’ (*The Telegraph Online*, 19 January 2016) <<http://www.telegraph.co.uk/news/religion/12106833/David-Cameron-I-will-back-schools-and-courts-which-ban-face-veils.html>> accessed 21 January 2016.

¹⁶ Press conference held by The Lord Chief Justice of England and Wales on Tuesday 5 November 2013 (*Judiciary.gov.uk*, 5 November 2013) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/lcj-press-conference-2013.pdf>> accessed 14 January 2016.

¹⁷ Martin Bentham, ‘Top Judge Calls for Rules Which Force Women to Take off Veils when Giving Evidence in Court’ (*Evening Standard*, 12 December 2014) <<http://www.standard.co.uk/news/uk/top-judge-calls-for-rules-which-force-women-to-take-off-veils-when-giving-evidence-in-court-9920224.html>> accessed 14 January 2016.

¹⁸ BBC, ‘Top Judge Calls For Respect For Veiled Women In court’ (*BBC News*, 17 April 2013) <<http://www.bbc.co.uk/news/uk-32347761>> accessed 14 January 2016.

¹⁹ The Supreme Court, ‘Response To Media Coverage Of Lord Neuberger’s lecture “Fairness in the courts”’ (*Supreme Court*, 18 April 2015) <<https://www.supremecourt.uk/news/response-to-media-coverage-of-lord-neuberger-lecture-fairness-in-the-courts.html>> accessed 14 January 2016.

So it has actually gone to the back of the queue. At the moment, there is not a problem. We will keep it under review. There are very strong views that are held about it in many countries of the world and we listen to those, we monitor what goes on and we may proceed but if it is not a problem, it may be better just to stay where we are.²⁰

This response is somewhat opaque in defining what is considered a 'major problem'. It is not clear whether the Lord Chief Justice is referring to the fact that, as no other cases are reported as having come before the courts, it is of such rarity that it does not justify the allocation of resources to it. Alternatively it could be interpreted as meaning that *R v D* enunciates the position with sufficient clarity so as to obviate the need to promulgate any further guidance.

Either of these interpretations leaves the law in an unsatisfactory position. It may well be the case that in England and Wales no further cases have come before the criminal courts and so no judge has been confronted with the difficult decision faced by HHJ Murphy. It is certainly the case that statistically these cases should occur infrequently. There is no data available as to how many women wear the veil but the numbers are thought to be very low. A study in France in 2009 suggested that only 0.1% of Muslim women wore the full face veil.²¹ However to proceed on the basis that the absence of cases is indicative of an absence of a problem is potentially misguided, as it ignores the possibility that the publicity surrounding *R v D* has led to a fear amongst women who chose to wear the veil, that if they report crimes against them to the police they will have to compromise their religious integrity should they be called upon to testify in court. This perception may deter those adherents who become victims of crime seeking the assistance of the authorities and marginalise an already potentially vulnerable sector of society. Data suggests that women who wear the veil are disproportionately more likely to be the victim of violent crime than other members of society. In the year from November 2014 to 2015, the Metropolitan Police reported that Islamophobic attacks increased by 171% - from 60 to 163.²² In the seven days following the terrorist shootings in Paris on 13 November 2015, 115 Islamophobic attacks were reported to the police.²³ In analysing Islamophobic attacks, Littler and Feldman²⁴ identified that a high proportion of the victims were women whose attackers were white males, and that in 80% of cases these victims were identified to their attackers as Muslims by their clothing, predominantly the veil.

Given these statistics it is, perhaps, surprising that a court in England and Wales has not encountered this issue since *R v D*, and it seems unlikely that this will remain the case for long. In *R v D*, HHJ Murphy explicitly stated that his ruling only applied to defendants and should not be extended to prosecution witnesses,²⁵ however it is difficult to see how, if his reasoning his correct any distinction could be drawn. His rationale for compelling the removal of the veil in *R v D* was that the need to observe the demeanour of the witness was such a crucial element to the working of an adversarial trial that it justified the restriction of Article 9.²⁶ It would be hard to see how if a defendant invoked this argument against a prosecution witness, and *R v D* was applied, any sensible distinction

²⁰ Press Conference (n 16).

²¹ Channel4.com, 'Britain's Niqab: Unveiling the Facts' (*Channel4.com*, 24 October 2013) <<http://blogs.channel4.com/factcheck/britains-niqab-unveiling-facts-factcheck/16232>> accessed 14 January 2016.

²² Metropolitan Police Crime figures, available at http://www.met.police.uk/crimefigures/textonly_month.htm.

²³ 'Islamophobic Attacks Triple in London Following Paris Attacks – Met Police' (*RT International*, 4 December 2015) <<https://www.rt.com/uk/324769-islamophobic-attacks-london-paris/>> accessed 15 January 2016.

²⁴ M. Littler and M. Feldman, *Tell MAMA Reporting 2014/2015: Annual Monitoring, Cumulative Extremism, and Policy Implications* (Teesside University Press 2015).

²⁵ (n1) para 7.

²⁶ (n1) para 77–79.

could be drawn (indeed given that in *R v D* the need to see the witness overrode the defendant's right to give evidence it would be hard to conceive how a judge following the reasoning in that case could resist an application made by the defendant). It would be troubling if victims of Islamophobic attacks were being deterred from giving evidence because they believed they would be forced to compromise their dress to give evidence or if those who had committed such offences were able to cause further discomfort and anxiety to the victims of their crime by applying that the veil be removed at court. An example of the difficulty which can be caused is, at the time of writing, being played out in Scotland where the trial of a man charged with racially abusing a woman wearing a veil has been adjourned for legal arguments after the complainant indicated she would refuse to testify if she was compelled to remove her veil.²⁷ It is important to note that whilst the offence is denied and the defence advocate is making a proper application in law, that the absence of clear guidance has required each party to make argument on the point and there is a real possibility of the case not proceeding if the witness refuses to testify without her veil. If the Sheriff refuses the defence application and the defendant is ultimately convicted the issue may well be relitigated on appeal. Whichever decision is ultimately made will have profound effect on one party or the other, regardless of the merits of the evidence and it is desirable that judges confronted with this decision have the benefit of clear guidance from either Parliament or the senior judiciary. If, as seems to have been the case in 2013, the Lord Chief Justice recognises that guidance is needed, that need does not diminish simply because no other cases have arisen, such an absence of cases may make the need for guidance of greater importance.

Alternatively, it could be said that the Lord Chief Justice is expressing the view that *R v D* settles the position with sufficient clarity and no further intervention is necessary. The judgment was disseminated widely and adopted into the legal literature. For example amendments were made to four different sections of Archbold, the main practitioner text on criminal practice, to accommodate and alert advocates and the judiciary to the principles that flowed from it.²⁸ Without any further intervention, it is likely that these principles will be followed in subsequent cases. However simply leaving *R v D* to reflect the status quo would also be an unsatisfactory solution. The judgment does not address the position of prosecution witnesses nor parties in any other tribunal apart from the Crown Court and before a jury. It does not, for example, address whether a district judge in the Magistrates' Court can permit the veil to be retained whilst directing him or herself that they have not been able to assess demeanour.²⁹ It does not help with the question of whether petitions for nullity of marriage should be heard only by female judges, allowing the petitioner to remove their veil.³⁰ Perhaps more significantly, treating *R v D* as the final position fails to recognise HHJ Murphy's own concerns about a single judge having been left to determine a sensitive issue, with much wider ramifications. In the public mind, the decision made in *R v D* represents the delineation of a boundary between the rights of a minority group and the authority that society vests in the judiciary. Such decisions are of such importance that the burden of making them should not rest with the ad hoc determinations of individual judges at first instance whose role is to decide cases on the facts before them.

²⁷ Gary Fitzpatrick, 'Trial Adjourned After Woman Refuses to Give Evidence without the Veil', (*Scottish Herald* 15 December 2015) <http://www.heraldsotland.com/news/14145051.Trial_adjourned_after_witness_refuses_to_give_evidence_without_a_veil/> accessed 26 April 2016.

²⁸ James Richardson QC, Archbold: Criminal Pleading Evidence and Practice 2016 (2016 edition, Sweet & Maxwell 2016) at paras 4-167a, 8-41a, 16-83, 16-156.

²⁹ The approach taken in *R v M* (Nottingham Magistrates' Court, 7th November 2001) unreported, prosecuted by the author of this paper.

³⁰ The approach suggested by Macur J in *SL v MJ* [2006] EWHC 3743 (Fam).

The veil is undoubtedly an emotive and controversial subject and, as the surveys quoted above indicate, one on which views are sharply divided. For the political right it represents a visible manifestation of the perceived Islamification of the UK. For the liberal left it is indicative of a patriarchal subjugation of women. The decision a judge must make in assessing whether a witness may retain the veil whilst testifying must revolve purely around the potential consequences of the decision to the fairness of the trial process and should operate to implement and not create public policy. The rationale for requiring the veil's removal is usually expressed in terms of it acting as an impediment to assessment of demeanour when assessing credibility although these arguments are often based on perception and restatement of traditional practice without evidence to corroborate their value. As the Canadian Supreme Court noted (whilst directing that a witness should remove her veil to allow her demeanour to be assessed):

[F]uture cases will doubtless raise other factors, and scientific exploration of the importance of seeing a witness's face to cross examination and credibility may enhance or diminish the force of the arguments made in this case.³¹

The idea that this is an area which is capable of exploration should not be ignored and before promulgating such guidance there are two issues on which evidence can and should be obtained;

- (1) Does the wearing of a veil by a witness impede a fact finder's ability to assess the credibility of that witness?
- (2) Would the knowledge that she may be compelled to remove her veil to testify, potentially deter a victim of crime from reporting that crime to the police?

Unless there is evidence which establishes the first of these questions in the affirmative, then there is no evidence that the fairness of the trial being compromised, and so no legitimate reason to compromise the protected Article 9 right of a witness. There is already a body of research which doubts the ability of lay observers to accurately discern credibility from facial expression³² and this needs to be very carefully considered before the conclusion can be reached that there is actually a problem which needs addressing. The issue of the veil adversely affects the audibility of a woman wearing it has been dismissed through experimental research at the University of York³³ and any further conclusions on the effect of the veil on the trial process should be reached on the basis of academically robust reasoning rather than assumption. If there is evidence which supports the first proposition then consideration needs to be given to the second. If it is the case that even a small proportion of those women who adopt the veil would be deterred from asserting or defending their rights through law enforcement bodies if they believed they would be forced to expose their face in public, then adopting a rule of law which created such an obstacle potentially offends against the UK's obligation under article 9 of the 2012 EU Directive on the rights of the victim which requires member states to ensure that:

[V]ictims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In all

³¹ *NS v The Queen* [2012] 3 SCR 726 [44].

³² For example P. Ekman and M O'Sullivan 'Who Can Catch a Liar?' (1991) 46(9) *American Psychologist* 913.

³³ C Llamas, P Harrison, D Donnelly, and D Watt, 'Effects Of Different Types Of Face Coverings On Speech Acoustics and Intelligibility' (2008) *York Papers in Linguistics Series* 2(9) 80.

contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.³⁴

If the answer to both of the propositions above is ‘yes’ then consideration needs to be given to adopting steps which ensure the fairness of the trial process whilst permitting the victim to assert her right to manifest her religion. The adversarial trial process has shown itself able to adapt to allow evidence to be admitted in different forms. Contested evidence is, when the appropriate circumstances are met, now permitted by hearsay provided that the jury are directed that they have not been able to observe the witness under cross-examination.³⁵ Changes in attitude to court room advocacy towards vulnerable witnesses have led to a change of approach in the questioning of children and those with disabilities. In order for the court to be able to interfere with the article 9 right of citizen it must first establish that it is ‘necessary’ to do so. If alternative, less intrusive, means of presenting the evidence are available then there can be no justification for requiring the wearer of a veil to compromise her belief.

The UK is a pluralist, multicultural society which explicitly supports the right to manifest religion. The court system is the mechanism by which an individual can assert and enforce their rights. Any requirement that an individual must satisfy a condition before engaging with the legal process has the potential to deter individuals from seeking relief. Where that requirement is more onerous to a section of society identifiable by gender and religion then the rule of law is jeopardised. To adopt the trenchant language of Abella J giving the dissenting judgment in the Canadian authority, “to those affected, this is like hanging a sign over the courtroom door saying ‘Religious minorities not welcome’”.³⁶ This is not to say that situations cannot arise where an interference is justifiable but such interference, however short lived, must be objectively justified and for a legitimate purpose. Compelling a witness in a trial to remove her veil to give evidence is such an interference. Although, the overall number of cases in which the issue must be addressed is very small, the consequences, both for the individuals involved as witnesses and defendants, but also in demarcating the extent to which the state can interfere with an individual’s genuinely held religious belief, are great. Indeed it is the relative lack of experience that judges and advocates will have in dealing with such cases that makes clarity imperative. This issue deserves attention and guidance from either parliament or the senior judiciary and such guidance should be clear, of universal application and justified. The decision making process should not be informed by personal perceptions or public opinion but by through evidence which identifies firstly whether there is any harm in conducting a trial with a veiled witness and, if this is the case, whether this problem can be solved without marginalising a potentially vulnerable section of society.

³⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 *Establishing Minimum Standards On The Rights, Support And Protection Of Victims Of Crime, and Replacing Council Framework Decision 2001/220/JHA* [2012] OJ 2 315/57.

³⁵ Criminal Justice Act 2003 c.44 s. 114–118.

³⁶ (n30) para 94.

WHY THE VEIL SHOULD BE REPUDIATED

YASMIN ALIBHAI-BROWN

In the global village, ideas, practices and policies cannot be kept within borders. In this section, I focus mostly on the UK, though I do refer to other countries and realities. My arguments rest on this premise: all of us in are in it together. We cannot be islands within islands.

But first, that question: should we outlaw veils?

No. Bans are cudgels. They punish or frighten veiled Muslim women or, worse, criminalise them, as in France. That would be deeply unjust and a violation. However, laissez-faire is either apathy or surrender – both forms of inexcusable disengagement.

There is a third way. I think it is perfectly fair and civilized to insist on dress codes that apply to all citizens in schools and other public service establishments, and, within limits,¹ the private sector too. In broadly liberal societies, restrictions are imposed for the greater good. Nudists cannot walk our streets with impunity, and women would not be allowed to work in a bank dressed like lap dancers or nuns. What Muslim females wear as they walk on streets or in parks and shared spaces is their business. But when talking to teachers in school, or cashiers in the bank, they must be obliged to show their faces. It is a difficult distinction and a tough call – but one that must now be made.

This issue cannot be left to Muslims to debate and decide. British citizens from all backgrounds have a stake in what is happening. (After all, conservative Muslims openly scorn western women who dress brazenly, and in their faith-based schools no child would be allowed to wear a skirt that didn't go to the calves or feet. Respect is demanded, not given.) Liberal Muslims would dearly like institutions and key individuals to take a stand on their behalf. Not to do so betrays vulnerable British citizens and the nation's most cherished principles, including liberalism. Worst of all, silence encourages Islam to move back even faster into the past instead of reforming itself to meet the future.

Within reason, some concessions can be made for British Muslims for whom the veil has become a test of acceptance – for example, permitting trousers instead of skirts, as is the case in most schools. Headscarves can be accommodated, but only for adult women – not for children. I would extend this rule to include Hassidic Jewish children and Sikh boys who turn up in top knots or mini turbans.

For many of us secular Muslims, hijabs concede that parts of a woman's body need to be hidden, that females are a sexual menace or in perpetual danger from males, all of whom are presumed to be predatory. Scarves are so widely worn now that we who object must compromise. At least some women are making them colourful and beautiful. Many of them would not be allowed into post-school education and employment if they showed their hair, so on this, they win. I will, however, continue to contest the idea that hair, if shown, is a sign of wantonness.

Encouragingly, scarved and cloaked women have found smart ways to subvert that prejudice. Creative hijabis turn scarves and gowns into beautiful fashions. Some of the best beauty blogs are by hijabis.² They really know how to make the face alluring and defiant. Jewellery too has become a mark of individuality and style. Sometimes the head is covered but feet are in killer heels and clothes tight-fitting. I find that awesome, even though it is a little hypocritical.

¹ It would, for example, be unreasonable to ask customers to unveil in shops, but shops and businesses should be able to have reasonable codes for their workers.

² See for example, Sanna @lookamillion and www.prettynotincluded.com.

It is time to reclaim the right to openly talk about these garments and assert that it is not ungodly, imperialist, 'Islamophobic' or self-loathsome to make the case against various forms of the veil.

Here are my main arguments:

RESISTING WAHABISM

Rigid, radical Muslim clerics and their backers are competing to gain control of, and stamp out, the diversities of worship and practice around the world, including here in Britain. In cities with Muslim populations, Shias are maligned, mosques are becoming factional and fractious, and inhabitants of various backgrounds have become wary and uneasy. We must get our government to watch and rein in Wahabis, Deobandis and Salafis – representing the three schools of reactionary Islam. Concerned British citizens of all backgrounds should put pressure on their MPs. British governments have too long been overfriendly with Saudi Arabia and some Gulf states. These nations are indoctrinating Muslims into unacceptable submission, and implicitly encouraging anti-West hatreds.³

A COVER FOR SEXISM AND SEXUAL VIOLENCE

Muslim reactionaries are obsessed with women's bodies. Females to them are 'only bodies, instruments for either legitimate pleasure or temptation, as well as factories for producing children'.⁴ The appallingly high number of cases of child exploitation by Pakistani Muslim men in Rotherham and elsewhere comes from these sick attitudes. Veils are often defended as a protective measure, a way of preventing molestation. That should mean there is no rape or sexual violence in Saudi Arabia or Iran, where some form of female covering is legally enforced. Rape and sexual violence are, in fact, rife in the two countries, and within Asian families in Britain. Ruzwana Bashir, a British Muslim woman, broke all barriers, became president of the Oxford Union and is now a company CEO. She was born and raised in Skipton, in the north of England, in a traditional Muslim family. There, she was abused by a neighbour from the age of ten, a man from her community. When, as an adult, she went to the police, her family were furious with her: 'sexual abuse has been systematically under-reported among Asian girls due to entrenched cultural taboos'.⁵ This means that the abuse is kept hidden. There have been cases of Imams and religious teachers using boys and girls sexually. These veils simply veil the truth. It is time to break the silence about these taboo subjects.

UNFAIR TO MEN

Veils cast all men as animalistic creatures with no control over their carnal natures, who are programmed to fall uninvited upon bosoms and lips, and have their way with any passing female (who, therefore, must wrap up in sheets and masks). Perhaps men should wear blindfolds? I see Muslim men everywhere in Britain, surrounded by

³ 'To Really Combat Terror End Support for Saudi Arabia', Owen Jones, *The Guardian*, 1 September 2014.

⁴ Alaa Al-Aswany, *The Independent*, op. cit.

⁵ 'The Untold Story of How a Culture of Shame Perpetuates Abuse', *The Guardian*, 30 August 2014.

non-veiled women. Most work, walk, shop, eat and drink and are not wild beasts full of lust. Decent and egalitarian Muslim men should be out protesting against this unfair characterisation.

SISTERHOOD

Women who make the decision to veil are colluding with gender repression across the Muslim world. This choice cannot be separated from compulsion. It cannot be free-standing and severed from the savage imposition of the garment in many Arab lands, Pakistan, parts of Africa and, increasingly, western nations. We know Muslim women are forced into niqabs and chadors in Iran, Saudi Arabia, Afghanistan, parts of Nigeria and elsewhere, and that they are flogged if they don't, or worse. My question to those who freely choose to wear these coverings is this: What kind of sisterhood is this? When you know all this about enforced coverings, how do you not throw yours off in solidarity? In this country, parents forcing their girls to cover up use those who do so voluntarily as an example. Young girls tell me they are told: 'Look at them. They are real Muslims. You are full of sin if you don't follow them.' Reactionaries have persuaded outsiders that none of the females are coerced. Some do so of their own volition, others do not. They are either made to by adults or by their more 'obedient' mates. Independent Muslim women who care about equality should take a stand and refuse to cover themselves. They should learn from those activists who refuse to wear clothes made by slave labour. Activism is about connections – the near and far – and political empathy.

CHOICES CAN BE DECEPTIVE

The case of Shabina Begum was salutary. In 2002, the schoolgirl took her secondary school to court because it would not let her 'progress' from the hijab to the jilbab. She did not attend classes for two years and eventually won the case. For many of us modernist Muslims, this was a body blow. Her brother, a member of a defiantly anti-western Muslim group was, apparently, behind this decision. Her parents were dead. On appeal, her claim was rejected. The judge took the view that her full cover would put undue pressure on other Muslim pupils who were happy to wear the school uniform and that would disturb the delicate ecology of school life. Shabina Begum was clearly doing what her brother told her to, because he was her guardian. If girls are trained to make this choice, it is not a choice. In any case, this is not just a consumer choice, but one that is loaded with meanings and implications. I have spoken to several lots of sisters, all of whom cover up in some way. Not one felt able to dress freely. All said they could not go against family and community wishes.

THERE IS SUCH A THING AS SOCIETY

Segregation damages societies. Self-segregation does so too. Girls' schools in Britain are great for education, but often really damage self-esteem and wellbeing. So it is with veiled women, only more so. That must have consequences for integration, ambition and prospects. They inhabit a restricted space, real or imagined. That is not good for them or society. Veils send non-verbal messages: wearers have to stay within the fold and limit the range and depth of relationships with outsiders. Yes, some do in fact have good friends who are not from their tight circles, but those friendships are constrained.

Can a Hindu or atheist girl stay the night with a veiled Muslim friend? What about vice versa?

BODY IMAGE

Like other women around the world, veiled women can suffer from bad anxieties about their bodies, beauty and desirability. The onus is on them to obey and please men. The claim that they are released from those pressures is just another big beauty myth. While we talk openly and often about the negative impact of our perfectionist and sex-obsessed culture on other women and girls, hardly anyone dares to speak up about similar pressures on traditional Muslim females. It is time to discuss this issue honestly and publicly.

BRAINWASHING

In contemporary culture, women and girls are pushed into following the dictates of fashion – but they are not threatened or punished if they refuse to comply. Muslim females are programmed to obey and don't feel they can reject head or body coverings because that would make them pariahs in some communities. Research is needed into how the veil is spread and by whom, and, most importantly, the deep influences and pressures on females.

HEALTH

Getting no sunlight leads to vitamin D deficiency. An Australian study carried out in 2009 confirmed this.⁶ There is a resurgence in rickets and other bone diseases in Muslim communities. (They do, however, avoid the perils of skin cancer, caused by too much exposure to sunlight.) Far more serious is the domestic violence that can be concealed under niqabs and burkhas. Not all women in burkhas are the walking wounded, but some are, and the tragedy is that it is impossible to pick up the signs. The usual network of concerned people – neighbours, colleagues, pupils, teachers, police or social workers – would need to be approached by the traumatised women and girls, otherwise the problem would remain hidden.

COMPULSION

We simply do not know how many women are compelled and how many choose to veil. We cannot assume they are all choosing the garments. The problem is we can never know for certain. We do, however, know children are being made to cover up. Proselytisers are increasingly autocratic on this matter. The state needs to protect mothers and children from them. If it can't intervene directly, dress codes are the fairest way of dealing with the trend.

OBSTACLES TO PERFORMANCE

Veils hamper proper professional functioning. You cannot teach, give evidence, drive, treat patients, deal with public service workers or be on the staff if you do not show your face. I would go further and say long cloaks too are a hindrance. Muslim women were

⁶ See www.islam-watch.org.

just starting to join the workforce in greater numbers when veils began to spread. In 2005, Aishah Azmi decided to put on a niqab while working as a teaching assistant after, it is said, she was commanded to do so by a religious leader. She was sacked because she could not do her job properly. She took her case to tribunal, which dismissed her complaint. How sad is that? In that same year, Shabnam Mughal, a legal advisor, was asked by a judge to show her face and all hell broke loose. Eventually, the judiciary backed down. How do these women think they will get ahead? Interviewed by the journalist Andrew Anthony, Rahmanara Chowdhury, a teacher of interpersonal and communications skills in Loughborough, defended her burkha by saying she felt more empowered being just a voice. Well, soon some woman-hating Imam will pronounce that the voice or scent of a woman are too seductive to be allowed in public spaces.

SECURITY AND SAFETY

Alan Johnson, who was in the Labour Education Secretary in 2007, gave schools the right to forbid veils on these grounds and also because he felt such segregation affected communal teaching. He was right, but because of noisy opposition this vital power fell into disuse. In recent years, Islamicist plots have got bolder. Niqabs could become the perfect disguise for those who want to create mayhem. Airports and borders have to find ways to deal with this possibility and yet not offend veiled women. This is unfair.

COMMONALITIES MATTER MORE THAN DIFFERENCES

The banning of the headscarf in France was, in fact, supported by many Muslims. The state was too arrogant and confrontational but the policy was right. A secular public space gives all citizens civil rights and fundamental equalities and Muslim girls have not abandoned schools in droves as a result of the ban. I learnt another useful lesson on why it is important to disallow veils in a school in Delhi, where more than half the pupils were Muslims from traditional families. There was no hijab on the head of any of the girls. The headmistress told me this:

Our job is to educate and create commonalities between the children, not to stress the differences. It is to create a real spirit of equality, similarity and togetherness. Tolerance of difference is a weak concept. Yes we are all individuals, and from various backgrounds, but we are, in the end, all human. No parent has ever come in to ask that their daughter should wear a hijab. Actually one did, they had moved back from Blackburn. You are spreading these habits to us.

She said this laughingly, but she is right. America, a deeply Christian nation, does not allow religion to be manifested in schools either. We need educators to be similarly clear and confident on what school is for.

AUTONOMY AND INDIVIDUALITY

This is a society that prizes autonomy and gender parity. The burkha offends both these principles. The meek acceptance of the burkha by British feminists is baffling. They must be repelled by the garment and its meanings. I know many of them do feel uncomfortable and then bad about feeling uncomfortable. This is absurd relativism. What are they afraid of? Afghani and Iranian women fight daily against the shroud

and there is nothing ‘colonial’ about raising ethical objections to this obvious symbol of oppression. To the accusation that questioning this sexist garb reinforces patriarchy, because it infringes a woman’s right to decide how much or little to wear, I say prove to me that all the females have indeed chosen the veil. They can’t. Therefore they cannot, in all honesty, make the claims they do.

NOT A DISTRACTION, BUT A FUNDAMENTAL ISSUE

Those of us who argue against the veil are told it’s a red herring, a fuss about nothing – just dress, just clothes, that we should concentrate on the many bigger problems remain unsolved. This is sophistry and they know it. The feminists of Egypt and Iran back in the early part of the twentieth century were told the same. It didn’t stop them. We should turn the argument around and ask: why do Muslims focus on female clothes when they have so many other big challenges? Poverty, unemployment, corruption, human rights violation do not get the attention they demand, but veils do. And so we who cannot accept them are bound to attend to the coverings too.

DISTORTED VALUES

While non-Muslims fall over themselves to ‘understand’ and defend veils, the favour is not reciprocated. I do not hear conservative Muslims defending the rights of Muslim and non-Muslim women not to cover up. What if two teenage girls in the same family made their own choices – one to wear a hijab and the other to show her hair? Does anybody really think the second girl would not face anger and pressure? One Muslim writer asked in 2013: ‘How safe and included do veiled Muslim women feel?’ She did not ask the same question for non-veiled women who venture into Wahabi Islam enclaves. So I ask it here: ‘Is a girl in a short skirt safe? Does she feel respected in Muslim areas of, say, Bradford?’

IDENTITY, DISSENT AND REBELLIONS

I talk often to young veiled women to understand why they choose to cover up hair, bodies or faces. I realise for some it is a way of asserting cultural and religious distinctiveness, and for others, a way of irritating power and being rebellious. They do not want to be ground down to a uniform, western identity. That is indeed their right. I do admire their sense of themselves as part of a group. However, compromise is part of the social contract and it is not acceptable for this one part of society to refuse to give at all. Also, they must remember that the most extremist elements in our country also espouse the veil – only a minority, true, but they impact on the debate and choice.

COHESION

A nation cannot, and should not, support all demands in the name of cultural preferences or religious obligations. In several schools already, Muslim parents are refusing to let their girls swim, act, play music, go on trips or take part in PE – interference

that should not be tolerated. Veils are only one part of a bigger movement away from modernity and progressive values. It is insulting and also seems to cast aspersions on women who are not covered up. The message is: those who veil have morals, you are immoral. To white women the message is even more unkind: because you don't veil, you are presumed to have no morals or boundaries. The veil also indicates that females accept their various, burdensome roles: they are carriers of collective virtue; guarantors of sexual 'purity'; guards who stop western values crossing the threshold; subservient marriage partners, daughters, sisters, nieces, sisters-in-law, aunts, grans and so on. Subservient, that is, to all males in the family. Those women who do enter politics or get to the top of professions by donning a scarf, cloak or face cover again announce their inferiority or jeopardy to males and, of course, superiority to the females whose faces, arms, legs, hair, necks and cleavages are not kept under wraps.

RACISM

Over the last decade, the rise of extreme right parties across Europe is leading to racism directed at all people of colour and migrants, and, most of all, those who 'look Muslim'. I have witnessed hijabis and niqabis verbally insulted, spat at and sometimes pushed by white men and women. I have also seen the looks of anger and hatred they get. These women must be protected. The police and courts have not taken this issue seriously and they should. However, racism is too often used to stop debates and policies on veiling. We should be able to confront the evil of racism without giving in to obscurantist practices.

EUROPEAN LAW

In July 2014, the European Court of Human Rights in Strasbourg upheld the French law banning niqabs in public spaces. In 2008, that same court backed the French ban on headscarves in schools. The latest ruling did not mention any faith but concluded that the court was able to 'understand the view that individuals might not wish to see, in places open to all, practices and attitudes which would fundamentally call into question the possibility of open, interpersonal relationships, which, by virtue of an established consensus, formed an indispensable part of community life within the society in question'. This is a remarkably sensitive and bold declaration. It is one Britain's governing classes should take seriously.

Our society is a complex tapestry of various beliefs, practices, inclinations, lifestyles, differences and prejudices. It is intricate and relatively strong – but not that strong. If exclusion on grounds of race, gender, age and religion is wrong, then so too is self-exclusion.

I rest my case.

BOOK REVIEWS

LAW, GENDER AND RELIGION

The Experiences of Face Veil Wearers in Europe and the Law, by EVA BREMS (Ed.),
Cambridge University Press, 2014, 1st edition, 324pp, Hardback £64.00.
ISBN 978-1-10705830-9

INTRODUCTION

Discussion of the role of the face veil has increased in recent years, even more so in light of the fact that the European Court on Human Rights has held that France is entitled to ban face covering in public spaces on the basis of it hindering social interaction.¹ Proponents of the ban argue that banning the face veil has a number of legitimate aims such as the protection of public security, safety and public order, gender equality, human dignity, communication and the promotion of the notion of living together. Both France and Belgium have criminalised the face veil in the public sphere, a number of countries within Europe have a regional ban and there is now a growing movement within a number of European countries towards a general ban on the face veil.² Public space has been defined as including any space outside the home, and despite the long list of exemptions, covering the face as a religious manifestation has also been criminalised.³ The issue of the face veil has been subject to strong substantive human rights critique at both the domestic and international level. Some authors argue that the debates surrounding the face veil bans are so heated because the manifestation represents the Islam Europe does not want to see. As explained by Amnesty International:

In the last decade or so some stereotypical views on Muslims have been voiced by some political leaders and have been reflected in public opinion polls across Europe. In this discourse the establishment of Muslim places of worship and the wearing of religious and cultural symbols and dress are seen to illustrate “unwillingness by Muslims to integrate” or an intention to “impose values at odds with European identity”. On some occasions issues such as forced marriage, perceived as a Muslim practice, have similarly been cited to corroborate these ideas. At times public opinion and political parties do not distinguish between practices clearly violating human rights, such as forced marriage, and other practices relating to the exercise of freedom of expression and religion or belief, such as the choice to wear a headscarf or other forms of religious and cultural symbols and dress.⁴

The empirical study in the book under review concludes that it is undeniable that the face veil bans are rooted in an anti-Islamic climate in Europe, and that this legislation even risks reinforcing existing tensions.⁵

¹ *SAS v. France*, App no. 43835/11 (ECtHR, 14 July 2015).

² In France and in Belgium the Act of covering one's face is criminalised. France: Constitutional Council Decision of 7 October 2010, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf [last accessed 24 March 2016]. Belgium: Article 563bis to the Belgian Penal Code.

³ Constitutional Council Decision of 7 October 2010, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf [last accessed 1 February 2016].

⁴ Amnesty international, ‘Choice and Prejudice: Discrimination against Muslims in Europe’ (*Amnesty International*, April 2012)11–12. <<http://www.amnesty.eu/en/news/statements-reports/council-of-europe-0609/#VuEzdvmlSUk>> accessed 10 March 2016.

⁵ E Brems, Introduction in Eva Brems (Ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) pp 1–17.

Eva Brems brings a unique perspective to the debate, not least because she is a prominent professor of human rights law at Ghent University, but also because she was a Flemish MP for the Green Party at a time when the Belgian legislature was debating the bill prohibiting face veiling.⁶ She was the only person who voted against the bill. Two other MP's linked to the Green Party abstained. All other members of the House of Representatives supported the bill. No experts or NGOs were consulted, no role was consigned to the Belgian Equality Body and criticisms by human rights bodies were received with indifference.⁷

CONTENT

This edited collection seeks to fill in the gap in the current literature on face veil bans within European states, as it is suggested by the author that the voices of the women who have been affected by the ban is missing from debate. In fact, to date only a few critical voices are heard from human rights organisations and from a small number of scholars.⁸ The studies consist of small scale interviews in a number of different countries, which due to sample size, does not allow for wide-reaching conclusions. This edited collection challenges the popular discourse by providing empirical evidence as to the views and experiences of the women who wear the face veil, and what the religious symbol means for them where previously there had been very little. The book is in two parts.

Part I is entitled: 'Wearing the Face Veil in Europe' and captures the experiences of women who wear the veil, by way of interviews in five countries: Belgium, Denmark, France, the Netherlands and the United Kingdom. These studies were conducted by different researchers at different institutions and within a particular context. It builds on the lived experiences of face veil wearers and despite the studies spanning five countries with different socio-political structures and with participants from differing cultural backgrounds, the findings are remarkably similar. The findings of Eva Brems and the contributors to her edited collection highlight that these women are all marginalized in societies which claim to protect their rights to gender equality and from female oppression. It is suggested that Muslims who wear the face veil are marginalized by the ban as a result of their gender, religion and a combination of both, as only Muslim women wear the face veil. It thus fills the gap by including first hand experience in order to challenge the current discourse on face veils. One challenge, suggested by Eva Brems is that contrary to public opinion, it is not recent immigrants who have started to wear the face veils. The majority of face veil wearers were either born and bred nationals of the respective countries, or have lived there their entire lives. They wear it in order to continue on a spiritual journey, as opposed to common belief that they are isolating themselves from public life. In fact the studies evidence the contrary, as these women continue to interact with the outside world, although there is now an increase in the harassment these women face from strangers. Interestingly, the Danish study, commissioned by the Danish government, highlights that a high number of niqabi wearers are converts to Islam.

Annelies Moor's study highlights that an increasing number of face veil wearers in the Netherlands are native Dutch women who converted to the faith. This is in stark contrast

⁶ Article 563bis to the Belgian Penal Code: The Law of June 1st 2011 on the introduction of a ban on the wearing of clothing that completely or mostly covers the face was born.

⁷ N Fadil, Asserting State Sovereignty: the face veil ban in Belgium, in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 251–263.

⁸ E Brems et al, The Belgian 'burqa bans' confronted with insider realities, in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 77–115.

to the polarised public and political discourse on face veiling in the Netherlands, which views it as an archaic and anti-Dutch practice. Naima Bouteldja⁹ also remarks on the slight difference in statistics with regard to niqabis in the UK, who feel less isolated due to the proximity of other educated women who wear the niqab.¹⁰

The most interesting case study, however, concerns Belgium. Due to a political crisis, Belgium was without a federal government for 18 months between June 2010 and December 2011. Interestingly, one of the first bills passed by the Federal government at the time was the ‘anti-burqa bill’, which as described by Nadia Fadil¹¹, was passed ‘with a sense of urgency.’¹² Brems’ empirical research in Belgium has shown that criminalisation of the niqab has curtailed the autonomy of the women who wear it to a further degree. Instead of abandoning the niqab, women have remained in their homes and avoid going out except by car.¹³ This has led to the further marginalization of women who are already at the margins of society as a result of their multiple identities as Muslim and female.

Part II is entitled ‘Debating the Face Veil’, where a number of legal and social science scholars with expertise in this area of law were invited to contribute to the debate through engagement with the interviews discussed in Chapters 1–5. These chapters provide a wealth of further perspectives and discussions on the face veil debate beginning with a human rights debate on the face veil ban written by Professor Emmanuelle Bribosia and Professor Isabelle Rorive at the Institute for European Studies in Belgium. It sets the scene by exploring the public discourse on face veiling practices, which differs across cultures and can come in a variety of different styles, shapes and colours. It highlights particularly negative media discourse surrounding the ‘burqa’ which is the most extensive form of veiling. The voices of veiled women are rarely heard in the media, in fact, the object of discussion is disproportionately focussed on the veil instead of the veiled woman. In the few instances where the discourse does take the veiled woman into consideration, the lexicon is usually focused on the coerced/freely chosen binary, where women who insist they freely chose to wear the veil were accused of false consciousness.¹⁴ This is incredibly naïve, because although coercion can be found in some communities, the assumption that all veiled women are coerced to wear the religious symbol is refuted in Eva Brems’ collection, where participants stated that the veil made them feel emancipated and increased their levels of spirituality.¹⁵

Chapter 6 briefly covers the case law on the right to manifest a religious belief and the role of the margin of appreciation.¹⁶ It discusses the way in which the ECtHR has allowed for a wide margin of appreciation “where questions concerning the relationship between States and religions are at stake.”¹⁷ Justifications for limiting the right to manifest a religious belief by States and local municipalities include: the protection of public security, safety and public order, gender equality, human dignity, communication (which is also

⁹ Naima Bouteldja is a French journalist and co-editor of documentary film company, Red Rag Productions.

¹⁰ N Bouteldja, *France v England* in Eva Brems (Ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) pp 226–161.

¹¹ Nadia Fadil is an Assistant Professor at KU Leuven in Belgium.

¹² N Fadil, *Asserting State Sovereignty: the face veil ban in Belgium*. in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) pp 252.

¹³ *Ibid.*

¹⁴ False consciousness is a Marxist theory which asserts that people are blinded to their own social oppressions.

¹⁵ E Brems, *Introduction* in Eva Brems (Ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) pp 1–17.

¹⁶ E Bribosia and I Rorive, *Insider perspectives and the human rights debate*. in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 163–184.

¹⁷ *Ibid.*, at p 170.

described as sociability) and the notion of ‘living together’. The Court then examines whether the legitimate aim is necessary and whether the measure is proportionate. In this chapter, Bribosia and Rorive did not explore non-discrimination and although gender equality is discussed in more detail in a later chapter by Erica Howard, this has not been explored using the Court’s non-discrimination jurisprudence under Article 14, which would have made their argument more robust.

Intersectional discrimination is also not discussed in Erica Howard’s chapter on the gender equality justification. This may be because it falls outside of the scope of her chapter, which critiques the gender equality justification of Belgium and France for criminalising the face veil. Nevertheless, intersectionality theory would have been a useful lens to analyse the empirical data discussed in Part I. It is clear that intersectional discrimination is a relevant area, because the parliamentary debates in both France and Belgium, the only two countries with a nationwide ban on the face veil, evidence that the Acts are aimed specifically at Muslim women who wear the face veil. The discrimination faced by this class of women, which is based on their gender and religion since the face veil is exclusively worn by Muslim women, could have been explored in more detail within this chapter. Although Erica Howard’s conclusion is that gender equality is not a valid argument for banning Islamic face veils, there is limited engagement with the Court’s jurisprudence in relation to gender equality. Howard highlights the stark contrast between the representation of Muslim women who veil and the discourse in the media and the legal systems of the countries which ban the practice. However, despite her emphasis on autonomy and her conclusion that the gender equality justification on the ban on the right to wear a face veil is “based on a false premise about the oppression of women”, her argument would have profited from a more intersectional feminist approach. For each woman the term equality means something different and the empirical evidence in chapters 1–5 suggests that, to these women, equality means the right to wear their face veil. This could have been emphasised in the chapters which discuss gender equality. Dolores Morondo Taramundi also adopts a feminist approach in her chapter which examined women’s oppressions in light of the empirical data. Her work fits perfectly with the chapter on the gender equality justification and it is obvious why it follows from this. She draws attention to two distinct themes, the first theme is the misconstruction of the term ‘women’s oppressions’ and the second theme is the way in which women’s equality issues are politically manipulated by opportunistic politicians. Her chapter is very interesting and engages with feminist literature, she introduces intersectional sex discrimination in her conclusion, when this could have been discussed in more detail in her analysis on ‘women’s oppression.’ Chapter 7 is a particularly interesting chapter. Jochum Vrielink demonstrates that it is generally problematic to ban symbols, regardless of what they may symbolise. He uses the example of the swastika, which is banned across a number of Council of Europe states, but with a number of exceptions, at least in the German legal system, when used as a religious symbol on websites and temples.¹⁸ Furthermore, references were made to the ECtHR cases where a total ban on symbols was seen to be disproportionate and therefore a breach of Article 10, the right to freedom of expression.¹⁹

Vrielink navigates the jurisprudence on the banning of symbols under the ECtHR and recognises that the banning of a religious symbol (unlike a fascist symbol) goes against the heart of the freedom of religion. A freedom which the Court has described to be a

¹⁸ In the ancient Indian language of Sanskrit, swastika means “well-being”. The symbol has been used by Hindus, Buddhists and Jains for millennia and is commonly assumed to be an Indian sign.

¹⁹ *Vajnai v Hungary App No 33629/06 (ECtHR, 23 September 2014)*.

“precious asset” in its case law.²⁰ One critique of this chapter is that no reference is made to passive versus active symbols as described in both the *Lautsi* case, where a crucifix in a state school was described as a passive symbol and the headscarf in *Dahlab*, where a headscarf was described as a “powerful external symbol” capable of proselytising school children.²¹

The remaining chapters are equally as thought-provoking. In Chapter 11 Maleiha Malik adopts a comparative perspective, in her focus on the criminality aspect of the face veils. In Chapter 12 Nadia Fadil focuses entirely on the Belgium context which, as discussed above, is a classic example for the need for the consideration of an insider voice should a law disproportionately affect a minority group. In Chapter 13 Schirin Amir-Moazami focuses on the performativity of the face veil controversy. Amir-Moazami uses Foucault’s notion of the panoptical ‘logic of scrutiny’ to argue that the niqab reverses normative conventions. In the final chapter, Susan S.M. Edwards focuses on the prescription of unveiling and what this means for the autonomy/sexuality of women.

CONCLUSION

This edited collection highlights that through the ‘othering’ of women who wish to manifest their religious belief through the wearing of the veil, many Muslims find themselves at the intersection of gender and religion, in that they suffer from multiple oppressions as a result of both identities. It would be more appropriate if countries consulted and interacted with the women who will be most affected before legislating to ban. This edited collection illustrates that there needs to be further public discussion on the need for transparency when creating legislation. The book is critical, thought-provoking and necessary in the discussion on the navigation between law and religion. It addresses a clear gap in the current literature and answers questions which politicians have yet to ask. Although there are gaps in the book itself, such as the need for a deeper discussion of the role of the margin of appreciation and a linkage between the prohibition on the face veil with the the prohibitions on the headscarf, it is a welcome addition to the current scholarship on law, gender and religion.

AMAL ALI
PhD Candidate
School of Law
University of Sheffield

²⁰ *Sahin v Turkey App No 44774/98 (ECtHR, 29 June 2004)*.

²¹ *Lautsi and Others v Italy App No 30814/06 (ECtHR, 18 March 2011)* and *Dahlab v Switzerland App No 2346/02 (ECtHR, 29 April 2002)*.

HUMAN RIGHTS LAW

Human Rights Law and Personal Identity, JILL MARSHALL, United Kingdom, Routledge, 2014, xii + 271pp, Hardback, £95.00, ISBN 978-0-415-52972-3

Jill Marshall's book, *Human Rights Law and Personal Identity* explores the role that human rights law plays in the formation and protection of our personal identities. As such it comes at an opportune time. We live in an age when scarcely a day goes by without issues concerning our personal identities arising in public and private discourse: from the mapping of the human genome and debates over genetic origins of our various personality traits and medical conditions, to the fascination amongst many people with tracking their ancestry, symbolized by the popularity of TV shows such as *Who do you think you are?*; and from criminal justice concerns over identity fraud, through to worries that extremism and radicalization have their roots in deep confusion over identity and belonging.¹ And all this is not to mention the discontents of 'identity politics' which leads to the drawing of lines of inclusion and exclusion - of a 'them' and 'us' view of the world - which are prevalent in debates over the current European immigration/refugee crisis, over the debates on UK's membership of the European Union, and, indeed of what it means to be 'British' at all in the early 21st century.

This book seeks to map out the contours of personal identity and its relationship with human rights norms, and in doing so traverses a fascinating and complex landscape of law, philosophy, cultural and social study, and science. In taking us on this journey the author taps into an impressive array of sources to explore the prominent landmarks (from the Hollywood movie *The Truman Show*, George Orwell's *1984* and Antoine De Saint-Exupéry's *The Little Prince* through to the work of 'recognition theorists' such as Axel Honneth and Charles Taylor, feminist scholars such as Seyla Benhabib and other well known political philosophers such as Martha Nussbaum, James Griffin, John Rawls, and Joseph Raz). In so doing she advances not only a persuasive theory of personal identity itself, but also explores its relationship to some of the slippery conceptual under-girdings of human rights law, principles such as autonomy, freedom, dignity and equality. All of these concepts are highly contested and the author does an excellent explicatory job, drawing on a wide range of disciplines. Further, whilst we might yearn for a reductionist 'tidy' vision of the self and personal identity that can be neatly captured in law and in the language of 'rights', this truly interdisciplinary work captures the inevitable 'messiness', richness and complexity of our human selves created by the vast diversity of influences upon us.

At the very outset the author identifies a profound and crucial divergence of view over what is meant by personal identity - a dichotomy that runs as a thread through all the themes covered in this book. On one view, she observes, personal identity has been seen, and is perhaps increasingly seen, as a matter of *self-discovery* whereby the self is considered to be a project to be worked on with the hope and intention that an *authentic, core*, self will ultimately be found. On this view, manifested in much of the so called 'self-help industry', the self constitutes the irreducible and unalterable core truth about who we already are; and our life projects ought to be concerned with discovering that pre-existing essence, our *real* identity. However, as Marshall argues, such an essentialist vision of personal identity, especially if translated into law and embodied in human rights, carries with it serious risks. It will lead to the *constraining* of human dignity and human freedom; and it might provide an unattainable goal - discovering the truth of who we really are - which we are constantly *having* to live up to. The danger

¹ David Cameron, MP, Prime Minister, BBC Radio 4's *Today Programme*, 18 January 2016.

inherent in this view is especially acute when it is afforded legal protection through human rights norms, where we might be required to make the 'right' decisions in line with our (supposed) core, authentic identity, and our actual choices may be rejected as unreasonable or incompatible with our 'true' selves.

A contrasting and preferable view, argues Marshall, is one which conceives personal identity *not* as self-discovery but rather as self-creation and self-determination. In developing this argument throughout the book the author shows the interconnection between human rights law and personal identity. Whilst both are often accused of being based on individualistic and 'atomistic' visions of the human being, Marshall argues that human rights' purpose – respecting human freedom and human dignity – must comprise more than the protection of a somehow already pre-existent authentic core self. For human rights to fulfill their purpose there is a 'need for an environment to exist and to be sustained where personal identity is created, developed, and nurtured'² and this needs us to acknowledge the *inter-subjective* quality of all our personalities – that our freedom and our dignity and freedom of personality formation take place in a *social setting* with assistance, support and interconnection with and from other people.

In order to frame and pin down the inter-subjectivity of identity within human rights law Marshall draws on the work of several feminist scholars and recognition theorists, in particular, Axel Honneth. By using the framework of 'recognition' the inter-personal aspect of personal identity is acknowledged in the understanding that *who* a person is, is created and developed in a social context of overlapping communities; and how one is perceived by others, *especially* the legal system, can adversely impact a person's psychology and sense of identity. The recognition, or not, of certain ways of living by political and legal systems forms part of who we are and can empower and constrain us. Marshall looks at how such recognition theories explain the development of self-confidence, self-respect and self-esteem, and how these combine with particular provisions of international human rights law to illustrate how human rights can (and sometimes fail to) play a role in the creation and protection of our identities.

Notwithstanding the adoption in the book of the recognition and feminist theorists that identity is created inter-subjectively through complex interactions with others, Marshall acknowledges that it is nevertheless 'still *your* life and no one else's . . . no one else can live it, "from the inside", for you: it is possible for you to interpret what happens to you and make decisions and take responsibility for them.'³ This is one of many instances where the author reassuringly descends from the rarified heights of social theory in order to remind us of the *individual* and *particular* human-ness of our lived experiences that go to make up our identities.

It is against this background and within this frame that the book proceeds to examine the ways in which human rights law protects facets of the human identity, (and also the ways in which it sometimes fails to do so, due, argues Marshall, to the adoption of a essentialising view of identity as a core, authentic self). Thus, having set out the aims of human rights law as purporting to translate moral norms of human freedom and human dignity into legal rights that humans have by virtue of their species, the book goes on to consider some of the most topical and interesting areas, with a broad (though far from exclusive) focus on the European human rights system and also some reference to national systems, notably the UK and Germany.

The book is in three parts. Within Part I, entitled 'Whose identity and what rights?', chapter 1 examines the evolution of the right to personal identity itself – and the

² At p 11–12.

³ At p 13.

personality as the subject of property and/or publicity rights. In particular the case law of Article 8 of the European Convention on Human Rights – the right to respect for private and family life, home and correspondence – is analysed with regard to its development of a private sphere within which each of us can develop our personality, but *also* in relation to our social lives – our connectedness with others that allow this development. The chapter concludes on a cautionary note: the embodiment of the slippery concept of identity as a *property right* may lead to conflict with the freedom of others to develop their own identities, and therefore ‘the so-called right to identity needs to be treated with caution’.⁴

Chapter 2, ‘The universal and equal quality of or individual identities’, grapples with the concepts of *universality* and *equality* and the problem of how these values mesh with the need to recognize the *particular* identities of individuals and their inevitable *diversity*. At one extreme is the liberal philosophy which conceives the person as a ‘self-possessed, egoistic, neurotic, bounded individual’ – stripped of its roots and connections; and at the other is the ‘depressing, and empirically inaccurate . . . cold determinism’ of communitarianism. Marshall’s solution is to argue that human rights can be reconstructed more adequately to encompass all people’s lives, experiences and ways of being – drawing on the work of Axel Honneth, Jennifer Nedelsky and Virginia Held amongst many others – and stressing relationships of reciprocity and interdependence rather than competition. It must be recognize that an individual’s identity is created in a social environment, and that the law needs to recognize us all as ‘individuals with moral worth and enable us to become who we want to be in our particularities’.⁵ Honneth theorises that self-confidence, self-respect and self-esteem can only be acquired and maintained inter-subjectively, through being granted recognition by others whom one also recognises. Thus, conditions for self-realization are themselves dependent on the establishments of relationships of mutual recognition. These are: *love* – the need for a small circle of significant others loving and caring for us; *respect* – which requires that fellow citizens regard us as ‘rights bearing’ individuals; and *esteem* – which is enjoyed when we are valued for our distinct contribution to society’s collective goals. In the succeeding chapters these concepts are intertwined with the discussion of human rights norms on a variety of topics.

Part II of the book, entitled ‘Protecting our fixed core identity’, commences with a chapter on: ‘Souls, sex and brains’ which examines the ‘core soul’ and case law on sexual identity, sexual intercourse and sexual orientation, and the way that neuroscience and genetics are increasingly supplanting notions of the ‘soul’ with the possibly unpalatable deterministic consequences of ‘telling us who we are’. Chapter 4, ‘Biology and blood’, picks up some of these themes, and examines whether the shift to thinking about our core identity as embodied in our genes is problematically reductionist, especially when, as is often the case, judges apply human rights norms in ways which require full disclosure of ancestry and parentage sometimes placing too much emphasis on genes and bloodline over and above important countervailing social factors – for example a ‘mother’s wish to stay silent, [and] not impart information and retain her own confidentiality and privacy . . . in the face of the growing trend focusing on identity in human rights tied to authenticity . . . which could erode the privacy and confidentiality some birth-givers seek’.⁶ Marshall concludes that we should be ‘wary of continuing to create an atmosphere of harm and damage to children who do not know their exact biological

⁴ At p 54.

⁵ At p 78.

⁶ At p 140.

parentage . . . instead . . . possibilities can be presented of situations which could, with proper love, care and nurture, be the focus of who we are rather than focusing on whose whose sperm and egg was used to form us pre-birth'.⁷

Chapter 5, 'Culture, ethnicity and religion' examines, using a vast range of sources, minority group rights and the rights of individuals within those cultures, and the difficult issue of choice to be within or apart from such cultures. One's culture and religion is often perceived to be an immutable and un-chosen, and universal rights are often presented as being in conflict with our cultural specificities especially in the case of women and girls whose cultures or religions may require different treatment to their male counterparts. Human rights norms, or their interpretation, often coerce minority communities through legal bans aimed at their ways of life, when those modes are deemed ostentatious or unreasonable by those from majority culture exercising power, often on the grounds of equality and dignity.⁸

Part III of the book, entitled 'Empowering and enabling our identities to exist' looks at how human rights might allow us to 'be and to become who we want in a self-creating, self-determining manner'. Chapter 6 then picks up some of the threads of chapter 5, examining how the 'unreasonable' and 'ostentatious' nature of some manifestations of identity, which may be considered fundamental by some, are not afforded legal protection in the same way that un-chosen biological characteristics often are. Perhaps the most celebrated example, in Europe, is the issue of the full face veil which is discussed in detail.⁹ Arguments that such prohibitions are necessary in order to force women to be free are, argues Marshall, examples of that 'constraining' version of human dignity and personal identity that she critiques throughout the book. She says, in cases where such clothing is worn by free choice and not coerced:

Such bans are in opposition to rights enshrined in human rights law which indicate the fundamental quality of the value of any choices being made by, belonging to, and constitutive of, *that particular person* and having those recognized by others in the form of law . . . This fear of the other, and imposing criminality onto the wearing of a piece of clothing, fails to recognize the other person completely in a democratic society as worthy of respect for who they are. . . . Criminalising anyone for looking a particular way does the opposite to building the qualities of self-confidence, self respect and self esteem.¹⁰

What should be decisive, argues Marshall, is that the woman considers it to be necessary in *her opinion* – in this case as a manifestation of her religious belief. And indeed, it does not need to be though necessary for religion reasons – she may want to wear it as an expression of her personality for some other reasons – and 'that view should be respected as hers'.¹¹

In the final chapter, 'Safety, love and care in creating identity' it is argued that love, care, empathy and compassion are vital in building our identities, especially in the early formative years of our lives. Particularly persuasive to this reviewer is the author's use of the work of Carole Gilligan, arguing that solving moral dilemmas based on interconnection, networks, sympathy, empathy and care for the other allows us to think of ourselves as 'belonging to and connecting with each other in reaching decisions'. This

⁷ At p 141. These are themes which the author revisits in chapter 7.

⁸ For example, legal bans on forms of religious dress worn by women and not men.

⁹ The publication of the book pre-dates the judgment of the Grand Chamber of the European Court of Human Rights in *SAS v France* (2015) 60 EHRR 11 in which the legal ban on face coverings in public places was found not to breach Articles 8 and 9 ECHR on the grounds that it was within France's margin of appreciation, not on the grounds of dignity or autonomy or public safety, but in order to ensure the right of *vivre ensemble* or 'living together' in France.

¹⁰ At pp 214–15 (emphasis in original).

¹¹ *Ibid.*

‘care ethic’ stands in contrast to the ‘competitive, detached and abstract way of morally reasoning – the ethic of justice’. This former kind of reasoning, with its emphasis on concern for *particular* needs of others in their *particular* contexts is preferable, in that it helps prevent detachment, coldness and lack of understanding of the vulnerability of persons. It is a ‘more positive, kinder, and more inclusive way to proceed in the context of thinking of who we are, of our identities and our human rights’.¹²

Overall this book is a very impressive achievement from a variety of perspectives. What is particularly striking is the way in which a great deal of difficult and abstract social theory and political theory, and the slippery and un-pin-downable concepts to which it relates – concepts of identity, self, dignity and autonomy – are grounded and applied in the context of the concretely and individually human and particular. The argument, steadily built up and reinforced over the course of the chapters, that identity is and ought to be about self-development and its relation to human rights as a means of ensuring and protecting human dignity and freedom is ultimately persuasive. It is certainly a book which deserves to be studied and taken seriously by all those interested in human rights, and indeed all those concerned with what it means to be a ‘self’ in the 21st century.

TOM LEWIS

Reader,

Nottingham Law School

¹² At p 224–5.

CASE NOTES AND COMMENTARY

The address for submission of case notes is given at the beginning of this issue

KILLING THE PARASITE

R v Jogee [2016] UKSC 8; *Ruddock v The Queen* [2016] UKPC 7 18 February 2016
(Lord Neuberger (President), Lady Hale (Deputy President), Lord Hughes, Lord
Toulson, Lord Thomas)

INTRODUCTION

2016 has been a good year for the criminal law in the Supreme Court. In *Taylor*¹ and now *Jogee*; *Ruddock* the Supreme Court has made genuine and relevant fault on the part of the defendant central to the question of his/her guilt.

R v JOGEE; RUDDOCK

On a June evening in 2011, Jogee and a man called Hirsi had been back and forth to the house of Fyfe and his girlfriend, Reid. Hirsi returned alone, but was no longer welcome at the house and Reid contacted Jogee who came and took him away. Reid sent Jogee a text telling him not to bring Hirsi to the house again, but within a couple of minutes Hirsi and Jogee returned. Hirsi entered the house while Jogee remained outside shouting encouragement to Hirsi (there was no evidence as to what was being encouraged), striking a car and waving a bottle. Inside Hirsi, not previously armed, took a knife from the kitchen, pointed it at Reid and then stabbed Fyfe who died as a result. Hirsi ran outside and he and Jogee left. Hirsi took money from Jogee who, according to text traffic from later on that evening, did not know of the stabbing. Hirsi and Jogee were both convicted of Fyfe's murder. The trial judge had directed the jury in accordance with the principles then thought to be applicable when D2 (Jogee) is accused of a crime committed by D1 (Hirsi) which is itself committed during the course of another crime in which D1 and D2 were both involved.

In Ruddock's case (on appeal from Jamaica) he and a man called Hudson set out to rob a taxi driver, Robinson. Robinson's throat was cut. Ruddock maintained that Hudson had done this while Ruddock was not present. Hudson pleaded guilty to murder and Ruddock was convicted after trial. The jury in Ruddock's case were directed in line with the same principles as the jury in Jogee's case.

In these conjoined appeals the Supreme Court (also sitting as the Privy Council in relation to *Ruddock*) tackled an aspect of secondary liability that has been commonly, and imprecisely, termed "joint enterprise".² "Joint enterprise" has passed into common

¹ *R v Taylor (Jack)* [2016] UKSC 5.

² The Law Commission must accept some responsibility for this misuse of the term (Law Commission, "Assisting and Encouraging Crime", Law Com. No.131 (HMSO, 1993) paras. 1.13 and 1.14, criticised in J.C. Smith, "Smith & Hogan

usage and as such is a term much used but little understood. At its broadest it denotes the principle by which two or more defendants are all guilty of an offence despite not all taking part in the offence in the same way. Using just two defendants (D1 and D2) the ways in which this can happen are:

- (1) D1 and D2 each, with the requisite fault element of the offence, perform at least part of the conduct aspect of the offence, making them joint principals.
- (2) D2 assists, encourages or procures D1 to commit offence X/a particular type of offence, making D2 secondarily liable for the offence committed by D1 – this is basic accessorial liability (BAL).
- (3) D1 and D2 set off intending to commit an offence together making them sometimes joint principals and sometimes principal and secondary parties respectively – this is common purpose liability (CPL)
- (4) D1 and D2 are jointly involved in, or at least set off to commit, offence A, during the course of which D1 commits offence B. D2 is guilty of offence B if s/he foresaw the possibility that D1 might³ commit crime B and continued to participate in crime A – this is “parasitic accessorial liability”⁴ (PAL),

PAL was the variant of joint enterprise involved in both *Jogee* and *Ruddock* and its scope was broad indeed. Nothing beyond D2’s involvement in crime A was required for D2 to be guilty of crime B, save that D2 contemplated the possibility that D1 might do it, or something like it.⁵ D2 could go from being guilty of affray to being guilty of murder simply through foresight that D1 might do something to cause someone’s death with the intention to at least cause grievous bodily harm. D1, however, must actually wield the knife and strike the fatal blow whilst intending to kill or cause grievous bodily harm. The differences in both conduct and culpability which led to guilty verdicts for D1 and D2 were stark and criticism of the doctrine has grown in recent years.⁶

PARASITIC ACCESSORIAL LIABILITY IS DEAD, LONG LIVE SECONDARY LIABILITY

In *Jogee*; *Ruddock* the Supreme Court and Privy Council killed off PAL, stating that all secondary liability is governed by the same principles:

- (1) D2 must assist or encourage D1 in the commission of offence X;
- (2) D2 must know any necessary facts which gives D1’s conduct or intended conduct its criminal character;⁷ and
- (3) with that knowledge, D2 must intend to assist or encourage D1 to commit offence X, with the requisite mental fault element for that offence.⁸

Criminal Law” (9th edn, Butterworths, 1999) pp 140–1. However the most recent edition (14th edn, 2015) prefers the Law Commission’s narrow use of the term (239–240) despite the broader uses of the term elsewhere (e.g. *R v ABCD* [2010] EWCA Crim 1622, [9]).

³ In *Gnango* [2011] UKSC 59; [2012] 1 AC 827 it was affirmed that D2 need only foresee what D1 *might* do rather than what he *will* do.

⁴ An inelegant but accurate term coined by Prof. J.C. Smith in “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453.

⁵ D2 need not foresee the precise offence which D1 commits, only the type: *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350, HL which extended the decision of the Court of Appeal in *R v Bainbridge* [1960] 1 QB 129.

⁶ For example, W. Wilson and D. Ormerod, “Simply harsh to fairly simple: joint enterprise reform” [2015] Crim LR 3; B. Crewe, A. Lieblich, N. Padfield and G. Virgo, “Joint enterprise: the implications of an unfair and unclear law” [2015] Crim LR 252; M. Dyson, “Might alone does not make right: justifying secondary liability” [2015] Crim LR 967; G. Virgo, “Joint Enterprise Liability is Dead: Long Live Accessorial Liability” [2012] Crim LR 850; M. Dyson, “More appealing joint enterprise” [2010] C.L.J. 425 and C.M.V. Clarkson, “Complicity, Powell and manslaughter” [1998] Crim LR 556.

⁷ [2016] UKSC 8, [9] following *Johnson v Youden* [1950] 1 K.B. 544, DC and *National Coal Board v Gamble* [1959] 1 QB 11, DC.

⁸ [2016] UKSC 8, [8] – [16], [88] – [97].

D2 is equally liable if it is a type of offence, rather than a specific offence, which s/he assists or encourages D1 to commit.⁹

The principles can adapt to differing circumstances, so that if there is an agreement between D1 and D2 it might be express or tacit¹⁰ and arise in spontaneous group violence as easily as in planned criminal activity.¹¹ It may be that offence X is one which may or may not happen in the course of a planned activity. For example, D1 and D2 commit an armed bank robbery together during which D1 shoots and kills a security guard, intending to at least cause him grievous bodily harm (offence X here being the murder of the security guard). D2 is secondarily liable for the murder if s/he intended that if anyone did cause them trouble during the robbery, the weapons they carried should be used to with the intent to at least do grievous bodily harm. That intent can co-exist perfectly well with a desire to commit the robbery without having to use the weapons. The Court termed this “conditional intent” and emphasised that intention is not synonymous with desire.¹²

If D1 goes beyond what D1 knew and intended to assist, that does not necessarily mean that D2 escapes conviction, as a lesser offence might still have been committed. In the paradigm case of murder this will usually mean D2 is guilty of manslaughter, specifically unlawful and dangerous act manslaughter.¹³

D2’s foresight of what D1 might do is relegated to its proper place as evidence from which D2’s knowledge and intention might be inferred by the jury.¹⁴ Mental fault is no longer sufficient alone or a guilty verdict as D2 needs to act to assist or encourage D1 with the requisite knowledge and intent.

COMMENTARY

This return to the foundational principles of secondary liability was the solution urged upon the Court by Jogege and supported by Ruddock.¹⁵ Although the principles now restated by the Court appear uncontroversial, and when one reads the judgment in *Jogege* it all seems rather clear and straightforward, it should be remembered that since the Privy Council’s statement of the principles of PAL in *Chan Wing-Siu*¹⁶ in 1984, there has been precious little judicial derogation from it, despite opportunities at all levels including the House of Lords and Supreme Court.¹⁷ Instead, BAL was overtaken by PAL such that the principles of PAL, in which foresight blurred into intention, led to a watering down of the requirements for all forms of secondary liability.¹⁸ It should be noted that the fault is not to be laid solely at the door of the judiciary; the great Professor J.C. Smith was in favour of PAL.¹⁹

⁹ *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350, HL remains good law on this: [2016] UKSC 8, [14] – [16].

¹⁰ [2016] UKSC 8, [92].

¹¹ [2016] UKSC 8, [95].

¹² [2016] UKSC 8, [91] and [92].

¹³ [2016] UKSC 8, [90] and [96].

¹⁴ [2016] UKSC 8, [92] to [95].

¹⁵ The author was junior counsel for Jogege. See summary of submissions to the Court at C Sjölin and F Gerry QC, “Joint Enterprise – Guilty by Association” Criminal Bar Quarterly Winter 2015 (4), 9 and “Joint Enterprise – Guilt by Association? What will the Supreme Court do later this month?” (online) <http://blogs.ntu.ac.uk/nlsblog/joint-enterprise-guilt-by-association-what-will-the-supreme-court-do-later-this-month/> (accessed 29 March 2016).

¹⁶ *R v Chan Wing-Siu* [1985] AC 168, PC.

¹⁷ *R v Powell*; *R v English* [1999] 1 AC 1, HL; *Gnango* [2011] UKSC 59; [2012] 1 AC 827.

¹⁸ See the summary of the law in D. Ormerod, “Smith & Hogan Criminal Law (14th edn OUP, 2015) p 213–237 and Hughes LJ’s summary in *R v ABCD* [2010] EWCA Crim 1622 at [9] and [10]. In *R v Gnango* [2011] UKSC 59; [2012] 1 AC 827 the Supreme Court failed to properly separate out the principles and analyse BAL properly.

¹⁹ See J.C. Smith, “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453.

The Supreme Court's Analysis of the Route to PAL

The Supreme Court puts the start of PAL down to the decision of the Privy Council in *Chan Wing-Siu*²⁰ where Sir Robin Cook stated that: ²¹

Th[is] case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.

That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

To determine how Sir Robin came to make this pronouncement, conflating contemplation with authorisation and leaving D2 guilty for the actions of D1 which s/he might only have foreseen as a vague possibility and done nothing to intentionally bring about, the Court set out to examine the history of secondary liability. The judgment traces BAL back to into the 17th and 18th centuries and follows its development up to *Chan Wing-Siu* and beyond,²² leading to the distillation of the principles of secondary liability given above.

Secondary liability is a common law doctrine (albeit one that was made statutory in the Accessories and Abettors Act 1861 s.8²³) by which D2 is liable for an offence actually committed by D1. Traditionally the terminology was that D2 “aid, abet, counsel or procure”, modernised by the Law Commission into assist or encourage.²⁴ The Law Commission also mentions procuring, but the Supreme Court disregards that mode of participation. There is, however, no reason why the same principles of secondary liability could not apply to procuring.

The Essence of Secondary Liability

The Court correctly identifies that it has never been a requirement that D2 caused D1's conduct, but there has always had to be sufficient connection between D1's offence and D2's conduct for D2 to be secondarily liable.²⁵ Lord Toulson had previously argued that a “broad theory of causation”, beyond mere “but for” causation, was a proper explanation of secondary liability²⁶ and some of the Supreme Court in *Gnango* appeared to be attracted to this idea.²⁷ For *Jogee* it was argued before the Court that the proper justification for D2's criminal liability for D1's offence is not causation but a sufficient connection to the offence, together with sufficient mental culpability; in essence intentional participation in D1's criminal activity in the knowledge of what that criminal activity is. These submissions were accepted by the Court,²⁸ albeit that the Court only expressly refers to assistance and encouragement as modes of participation.

²⁰ *R v Chan Wing-Siu* [1985] AC 168, PC.

²¹ *R v Chan Wing-Siu* [1985] AC 168, PC, 175.

²² [2016] UKSC 8, [18] – [35] for the law prior to *Chan Wing-Siu*, [36] – [59] for *Chan Wing-Siu* and beyond.

²³ A similar provision in s.44 Magistrates' Courts Act 1980 covers summary offences.

²⁴ Law Commission, “Participating in Crime”, Law Com. No.305 (HMSO, 2007) para 2.21, [2016] UKSC 8, [6].

²⁵ [2016] UKSC 8, [12] – [13] in which the example of highway men who part company some time before a robbery is used to explain that the man who left the group early on is not a secondary participant in the later robbery by the two remaining (*Hyde* (1672) as referred to in M. Foster, “Crown Law” (3rd edn, 1809), 354). Hale gives more details noting that a fourth man left only just before the robbery meaning that he was still criminally responsible liable for the robbery (M Hale, “The History of the Pleas of the Crown” (Nutt & Gosling, 1736) 536–7).

²⁶ *R v Mendez and Thompson* [2011] QB 876, CA (Crim Div), [18] – [23], *R v Stringer* [2011] EWCA Crim 1396, [47] – [54], R. Toulson “Sir Michael Foster, Professor Williams and complicity in murder” in Dennis Baker and Jeremy Horder (eds) *The Sanctity of Life and the Criminal Law: The legacy of Glanville Williams* (CUP 2015).

²⁷ *R v Gnango* [2011] UKSC 59; [2012] 1 AC 827, see Lord Clarke in particular, but also Lord Dyson.

²⁸ [2016] UKSC 8, [7] and [8].

The Court notes that D2 must intend to assist D1 to act with the mental element necessary for the offence, but in passing accepts that D2 and D1 need not have a common or shared intent that the final offence be committed, as in the situation where D2 supplies arms to D1 but is indifferent to whether D1 actually goes on to use them.²⁹ It is unfortunate that this is the only point in the judgment which refers to the fact that D1 and D2 might not share a common intention as more detailed analysis of this would have assisted in understanding the development of PAL, which, it is submitted, grew out of CPL rather than normal BAL cases. It is also important to understand that not all secondary liability cases involve agreement between D1 and D2, tacit or express; that is only one strand of secondary liability. Examination of CPL will therefore assist in understanding the different modes of secondary participation.

Common Purpose Liability

It is a mistake to see CPL as simply a branch of BAL as the CPL cases do not necessarily involve secondary liability. Historically the cases commonly involve riot³⁰ or poaching,³¹ which could involve D1 and D2 as joint principals, or as principal and secondary participants. Reported cases tend to deal with what happened when, for instance, a constable or gamekeeper was killed by D1 during the poaching or rioting: both D1 and D2 were guilty for the killing of a constable or gamekeeper by D1 if they shared an intention “to resist all opposers”³² or similar: as Alderson B put it in *Macklin*,

... it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent.³³

Thus the secondary liability arose out of the primary liability and the intention in relation to that. As a result, there grew the idea that further evidence of aiding or abetting was not required, as noted by Toulson LJ (as he then was) in *Mendez and Thompson*:

Although some distinguished scholars consider that joint enterprise liability [PAL] differs doctrinally from ordinary principles of secondary criminal liability, we incline to the view that joint venture liability is an aspect of them, as it is put in Smith and Hogan’s Criminal Law; 12th ed (2008), 207: “The only peculiarity of joint enterprise cases is that, once a common purpose to commit the offence in question is proved, there is no need to look for further evidence of assisting and encouraging. The act of combining to commit the offence satisfies these requirements of aiding and abetting. Frequently it will be acts of encouragement which provide the evidence of the common purpose. It is simply necessary to apply the ordinary principles of secondary liability to the joint enterprise.”³⁴

This is a misunderstanding of CPL, which is what PAL really developed out of; there *does* need to be further evidence of assisting and encouraging if D1 is going beyond the original common purpose. To be liable under CPL the scope of the common purpose must first be determined. If D1 goes beyond the common purpose, D2 is not, without more, responsible for D1’s offending. Determining the scope of the common purpose is thus crucial, but not always easy to do evidentially.

The Supreme Court relies upon Foster to say that the scope of the common intention was determined objectively in the 18th century.³⁵ There is much support for this argument.

²⁹ [2016] UKSC 8, [10].

³⁰ For example, *R v Wilkes* (1839) 9 Carrington and Payne 437; 173 ER 901.

³¹ For example, *R v Skeet* (1866) Foster and Finlayson 931; 176 ER 854.

³² *R v Tyler and Price* (1838) 8 Carrington and Payne 616; 173 ER 643.

³³ *R v Macklin* (1838) 2 Lewin 225; 168 ER 1136.

³⁴ *R v Mendez and Thompson* [2011] QB 876, CA (Crim Div), [17].

³⁵ [2016] UKSC 8, [19] – [21] citing M. Foster, “Crown Law” (3rd edn, 1809), 369–370.

It had been a rule of *law* into the nineteenth century that D was taken to intend the natural and probable consequences of his actions,³⁶ softened to a rebuttable presumption of *evidence* by the mid-twentieth century,³⁷ the principle only finally excised from the law by s.8 of the Criminal Justice Act 1968. However, the Court's failure to consider CPL and BAL separately causes problems here as Foster is not discussing CPL but instead D2 counselling D1 to offend. In the CPL cases there is no objective assessment of natural and probable consequences of D1 or D2's actions, just an assessment of what their common purpose was by looking at what they had agreed.³⁸ The 1913 case of *Pridmore*³⁹ shows the approach. While Pridmore and Ironmonger were out poaching in Titchmarsh Wood on a December night, they were surprised by gamekeepers. One of the defendants shot and wounded one of the gamekeepers. Both were charged with attempted murder. The jury could not determine who fired the shot but found both men guilty as they were agreed that the intention was "to prevent arrest at all costs, even to the extent of murder". On Pridmore's appeal, the Court of Criminal Appeal pointed to all the circumstantial evidence which supported the jury's conclusion and approved the judge's direction to the jury which focused not on what the probable results of being confronted by a gamekeeper would be but whether "both [defendants] must have realised that resistance at all costs was likely to happen".

If the actions of D1 went beyond the purpose which was common with D2, D2 was not, without more, criminally responsible. As Alderson B continued in *Macklin*

Thus, if several were to intend and agree together to frighten a constable, and one were to short him through the head, such an act would affect the individual only by whom it was done.

Of course the common purpose might change and it would be necessary to look at the evidence to determine what D2 had agreed to, even if only tacitly. It is when dealing with this aspect of CPL, determining the final extent of D1 and D2's common purpose, that the cases used language which was later to form the basis of PAL, but that language was taken out of context, leading to a misreading of these cases. In *Davies* the House of Lords discussed what evidence there was upon which a jury could conclude that a witness was an accomplice and stated:

I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault.⁴⁰ (emphasis added)

In *Smith (Wesley)* when discussing a conviction for manslaughter, not murder, (prior to *Church*⁴¹ laying down the principles of unlawful act manslaughter)

It must have been clearly within the contemplation of a man like Smith who, to use one expression, had almost gone berserk himself to have left the public-house only to get bricks

³⁶ See for example *R v Dixon* (1814) 3 Maule and Selwyn 11; 105 ER 516 and W. Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press, 1765–1769), vol 4, 200.

³⁷ See discussion in and conclusion of *DPP v Smith* [1961] AC 290, HL.

³⁸ An analysis performed by Dr Matthew Dyson of Trinity College Cambridge identified roughly thirty reported cases on common intention or purpose between 1810 and 1960 and these cases display no objective assessment of the parties' common purpose – all turned on the parties' subjective agreement, tacit or express. This formed part of the document submitted on behalf of Jogee to the Supreme Court at their invitation ("Submissions on Foundations of Liability for Secondary Parties on behalf of Ameen Jogee").

³⁹ *R v Pridmore* (1913) 8 Cr App R 198. The Court used the case of *R v Spraggett* [1960] Crim LR 840 as an example at [2016] UKSC 8, [25].

⁴⁰ *Davies v DPP* [1954] AC 378, HL, 401.

⁴¹ *R v Church* [1966] 1 QB 59, CCA.

to tear up the joint, that if the bar tender did his duty to quell the disturbance and picked up the night stick, anyone whom he knew had a knife in his possession, like Atkinson, might use it on the barman, as Atkinson did. By no stretch of imagination, in the opinion of this court, can that be said to be outside the scope of the concerted action in this case.⁴² (emphasis added)

In *Betty* the trial judge explained how far removed D1's actions were from the common purpose:

if two men attack a third without any intention of killing in the mind of either of them, and, as the fight develops, one or other conceives in his mind an intention to kill and does kill, of course, that does not make the other man guilty of murder, because he never contemplated that was going to be done, he did not intend it, and, in fact, did not do the act of killing.⁴³ (emphasis added)

In *Anderson and Morris* Lord Parker stated

It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.⁴⁴ (emphasis added)

Davies, Anderson and Morris (which considered *Betty* and *Smith*) and *Smith* were referred to in argument in *Chan Wing-Siu* and all had in fact involved an evidential consideration of what was within the common purpose, but all of them could be used, shorn of that context, to argue that contemplation of a circumstance was enough to bring that consequence within the common purpose. The Australian cases relied upon by the Privy Council in *Chan Wing-Siu* (*Johns*⁴⁵ and *Miller*⁴⁶) had gone further than the English cases and arguably already begun to create PAL by stating that contemplation of an event makes D2 secondarily liable for it. It is significantly easier to see how Sir Robin reached his conclusions when seen in this context.

Once PAL took firm hold in *Chan Wing-Siu* it was extended beyond its CPL roots to bring BAL down to its level in cases such as *Rook*⁴⁷ and *Reardon*.⁴⁸

The Supreme Court's Analysis of PAL

The Supreme Court's analysis of the development of PAL touches on *Betty* and *Anderson and Morris*, not to explain CPL, but to establish (1) that where D1's actions are "an overwhelming supervening event" no liability for murder attaches to D2 but (2) that D2 may still be liable for manslaughter in that circumstance.⁴⁹

The first of the Court's points is accurate and explains how, as PAL developed and its scope became clear, D2's lack of knowledge of D1's weapon was elevated to a defence of fundamental difference, as in *English*⁵⁰ where D1 and D2 attacked V with wooden posts, then D1 pulled out a knife and stabbed V to death, D2's conviction for V's murder was quashed as the knife was more dangerous than the wooden posts. Now that PAL has gone, the focus on the specific weapon used or precisely how dangerous it was,

⁴² *R v Smith (Wesley)* [1963] 1 WLR 1200, CCA. 1206.

⁴³ *R v Betty (Carol)* (1964) 48 Cr App R 6, CCA, 10.

⁴⁴ *R v Anderson and Morris* [1966] 2 QB 110, CCA, 120.

⁴⁵ *Johns v The Queen* [1980] HCA 3; (1980) CLR 10.

⁴⁶ *Miller v The Queen* (1980) 55 ALJR 23.

⁴⁷ *R v Rook* [1993] 1 WLR 1005, CA (Crim Div).

⁴⁸ *R v Reardon* [1999] Crim LR 392, CA (Crim Div).

⁴⁹ [2016] UKSC 8, [27] – [35]. The term "overwhelming supervening event" can be traced back to *Anderson; Morris*.

⁵⁰ *Powell; English* [1999] 1 AC 1, HL.

can be put in its proper place, which is part of the evidence for the jury to consider in determining what they are sure D2 knew and intended to assist or encourage.⁵¹

The second point is more complicated. All the parties in *Jogee* agreed that manslaughter would be an available alternative if D2 were acquitted of the murder carried out by D1 and the Court firmly concludes that manslaughter is an option available to the jury in such cases.⁵² However, the authorities were not in agreement about this, in particular the House of Lords in *Powell; English* was firmly against it⁵³ and Professor J.C. Smith certainly did not favour this option.⁵⁴ However, it is submitted that the Court is surely right, relying on the cases of *Church*⁵⁵ and *Newbury*⁵⁶ for the concept of unlawful and dangerous act manslaughter as an alternative to murder. In relation to offending short of murder, if D2 has committed a lesser offence, then the fact that s/he is not guilty of D1's more serious offence does not absolve him/her of liability for the lesser offence. This is still true if D2 is a secondary party to offence X (by counselling it, for instance) but the person counselled (D1) goes on to commit more serious offence Y.⁵⁷

The Court noted that there were serious problems with the basis of *Chan Wing-Siu*: its reliance on previous cases was misconceived and mistaken, taking arguments out of context and ignoring the factual backdrops of the cases it relied upon. The elision of contemplation and authorisation was simply wrong.⁵⁸ (Although when CPL is considered the decision and its reasoning can at least be understood, if not condoned.) Having established that lesser alternatives would be available for D2, the public policy arguments fall away, finally killed off by the need for "fair labelling of offending and fair discrimination in sentencing".⁵⁹ The Court bore in mind that PAL after over 30 years was not working satisfactorily and had in fact become controversial causing continual problems at trial and appellate levels. Beyond the practical problems, the Court accepted that foresight is too low a level of mental fault, particularly when D1 generally must have a significantly higher level of fault, and should only be used as evidence from a jury could infer D2's intention to assist what s/he had foreseen. This is particularly stark in murder.⁶⁰

The Court notes that the academic problems with the principle were noted from soon after the decision in *Chan Wing-Siu* (by Lord Lane in the Court of Appeal in *Wakely*⁶¹, by Prof. Smith in his commentary thereon and by Lords Steyn, Hutton and Mustill in *Powell; English*). Unfortunately, these concerns were not enough to divert the law from its PAL course. The Supreme Court stated that it had had the "benefit of a far deeper and more extensive review of the topic of so-called "joint enterprise" liability on past occasions"⁶² covering both the history and the impact of PAL, but that is not enough, it is submitted, to explain why PAL lasted so long.

⁵¹ [2016] UKSC 8, [58], [59] and [98].

⁵² [2016] UKSC 8, [96] and [97].

⁵³ *Powell; English, Uddin* [1998] 2 All ER 744, *Dunbar* [1988] Crim LR 693 and *Anderson and Morris* (1966) 50 Cr App R 216 all point away from manslaughter being open as an alternative for D2 on a charge of murder by D1. However, *Betty* (1963) 48 Cr App R 6 and *Reid* (1975) 62 Cr App R 109 suggest the opposite.

⁵⁴ See the discussion in J.C. Smith, "Smith & Hogan Criminal Law" (10th edn, Butterworths, 2002) pp 164–5 which suggests that Prof. Smith was of the view that D2 is liable for D1's offence or nothing.

⁵⁵ *R v Church* [1966] 1 QB 59, CCA.

⁵⁶ *DPP v Newbury* [1977] AC 500, HL.

⁵⁷ See C.M.V. Clarkson, "Complicity, Powell and manslaughter" [1998] Crim LR 556.

⁵⁸ [2016] UKSC 8, [61] – [72].

⁵⁹ [2016] UKSC 8, [74] – [75].

⁶⁰ [2016] UKSC 8, [81], [82], [83] and [84].

⁶¹ *R v Wakely* [1990] Crim LR 119, CA (Crim Div), commentary by Prof. Smith.

⁶² [2016] UKSC 8, [61] and [80]. As well as the Foundations document (146 pages long) the Court also had extensive materials provided on behalf of *Jogee* on the human rights aspect of the appeal (not mentioned in the judgment) and by the interveners ("Joint Enterprise Not Guilty by Association" and "Just for Kids Law").

Why did Professor Smith welcome PAL?

Professor Smith saw PAL as bringing a welcome subjective approach to the area of criminal liability:

Far from extending the law as stated by Foster and his successors, the Privy Council [in *Chan Wing-Siu*] were narrowing it by substituting a subjective for an objective test.⁶³

In that he was echoing what Sir Robin himself declared in *Chan Wing-Siu*.⁶⁴ The decision in *Chan Wing-Siu* was not, however, novel thought Prof. Smith:

It would be quite wrong to suppose that parasitic accessory liability--liability for a crime not intentionally assisted or encouraged by A but merely foreseen by him--is a recent development in the law, an innovation by the Privy Council in *Chan Wing-Siu*. The rule imposing liability for offences committed in the course of committing the offence assisted or encouraged seems to be almost as old as the law of aiding and abetting itself.⁶⁵

It was Professor Smith's criticism of Lord Lane's sensible judgment in *Wakely* (which focused on the need for the jury to find that D1's actions were within the agreement between D1 and D2, express or tacit, rather than merely foreseen by D2) which led to Lord Lane changing tack in *Hyde*⁶⁶ and following *Chan Wing-Siu* more closely, despite the fact that *Chan Wing-Siu* was a Privy Council rather than a House of Lords decision.

Unfortunately, it is submitted, Professor Smith was wrong. PAL was a pernicious theory which was not of ancient pedigree, but rather was an erroneous tangent. Had there previously been an objective assessment of the scope of the common purpose, Professor Smith and Sir Robin would have been right that *Chan Wing-Siu* narrowed liability, but there had not, as discussed above. The fact is that Prof. Smith appeared to be entirely in favour of PAL for policy reasons. Analysed very well by Andrew Simester this boils down to D2's position being normatively changed by the commission of offence A, making mere foresight sufficient for criminal liability for offence B.⁶⁷ This does not, it is submitted, justify the PAL low level of mental fault, such that suspicion alone made a person guilty of murder. This was in reality no more than constructive liability which thankfully disappeared with the abolition of the felony murder rule, although at least the felony murder rule required D2 to be committing a serious offence rather than a minor one to make him/her guilty of D1's murder of V,⁶⁸ the poachers committing a misdemeanour in Titchmarsh Wood had not been caught by this overly harsh rule. Professor Smith coolly conceded that,

It may be that the law is too harsh and, if so, it could be modified so as to require intention (or even purpose) on the part of the accessory that, in the event which has occurred, the principal should act as he did. Indeed, there is no decision preventing the House of Lords from taking this step.⁶⁹

Unfortunately the House of Lords did not take that step and it is submitted that Professor Smith's influential support for PAL extended its life.

⁶³ J.C. Smith, "Criminal Liability of accessories: law and law reform (1997) 113 LQR 453, 457.

⁶⁴ [1985] AC 168, PC, at pp 176 and 177.

⁶⁵ J.C. Smith, "Criminal Liability of accessories: law and law reform (1997) 113 LQR 453, 457.

⁶⁶ *R v Hyde* [1991] 1 QB 134, CA (Crim Div).

⁶⁷ A. Simester, "The mental element in complicity" (2006) 122 LQR 578.

⁶⁸ The felony murder rule being the rule which made all parties to a felony guilty of murder if one of their number killed during the course of the felony.

⁶⁹ J.C. Smith, "Criminal Liability of accessories: law and law reform (1997) 113 LQR 453, 465.

Was it the Supreme Court and Privy Council's place to radically change the law?

The Court was firmly of the view that it was, noting that:

... the doctrine of secondary liability is a common law doctrine ... and, if it has been unduly widened by the courts, it is proper for the courts to correct the error.⁷⁰

It did take comfort though, from the wording of s.44 of the Serious Crime Act 2007 which covers D encouraging or assisting the commission of an offence and requires from D an *intention* to encourage and assist, specifically noting in s.44(2) that D cannot be taken to have that intent just because he foresaw the encouragement or assistance as the consequence of his act.⁷¹

This is surely correct. When the courts have created an error in the law, particularly one which is due to a mistake by the appellate judiciary, it is for the courts to correct it as soon as possible.

The effect of Jogee and Ruddock: Appeals from those convicted under PAL/BAL under PAL principles

Jogee has successfully killed off PAL and made secondary liability both simple and principled. The Court accepts that it is “reversing a statement of principle”⁷² by so doing, noting that:

It would not be satisfactory for this court simply to disapprove the *Chan Wing-Siu* principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles.⁷³

Although it does not at any stage use the term “declaratory theory”⁷⁴ the court is nonetheless adhering to the principle that this decision of the court has retroactive effect (that it changes the law of the past rather than merely applying retrospectively⁷⁵), for it accepts that there is a potential impact on those convicted under PAL over the preceding 32 years, because the law, although “faithfully” applied, was “mistaken”. The court’s stance does not require the declaratory theory, only that this decision will have retroactive effect. The House of Lords has previously held that, in an appropriate case, a decision may have only prospective effect.⁷⁶ It may be that the Supreme Court was taking no stance at all and was carefully avoiding reference to the declaratory theory, a concept which has come under criticism from both the judiciary and academics, knowing that their decision was already of sufficient magnitude.⁷⁷

The retroactive effect of *Jogee* does not mean that all those convicted under PAL will be entitled to have their cases reopened by means of an appeal out of time to the Court of Appeal (Criminal Division). Indeed, the Court is keen to state that, just as it and the Court of Appeal have stated repeatedly over the years, the fact that the law has been

⁷⁰ [2016] UKSC 8, [85] and see also [82].

⁷¹ [2016] UKSC 8, [86].

⁷² [2016] UKSC 8, [79].

⁷³ [2016] UKSC 8, [87].

⁷⁴ A classic explanation is seen in *Willis & Co. v Baddeley* [1892] 2 QB 324 CA, 326: “There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable”. For a defence of the theory see Allan Beaver, “The Declaratory Theory of Law” (2013) 33(3) O.J.L.S. 421.

⁷⁵ See the helpful discussions of these terms in Ben Juratowitch, *Retroactivity and the Common Law* (London: Hart Publishing 2008) ch. 1, especially pp.6–9.

⁷⁶ *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41; [2005] 2 AC 680.

⁷⁷ Peter Mirfield, “A challenge to the declaratory theory of law” (2008) 124 LQR 190, Tom Bingham in *The Rule of Law* (London: Allen Lane, 2010) and in *Miller v Dickson* [2001] UKPC D4; [2002] 1 WLR 1615 [35], Lord Mance and Lord Sumption in *Ramdeen v Trinidad and Tobago* [2014] UKPC 7; [205] AC 562 [90].

corrected does not mean that the courts will entertain out of time appeals based simply on the new old law.⁷⁸ The principle for dealing with applications is this:

The court has power to grant such leave [to appeal out of time], and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to be mistaken.

The Court was also keen to emphasise that,

... the same principles must govern the decision of the Criminal Cases Review Commission if it is asked to consider referring a conviction to the Court of Appeal.⁷⁹

The desire to stem the feared flood of applications is understandable when one considers the creaking criminal appeal system,⁸⁰ although there is an immediate feeling of concern generated by the need for “substantial injustice” rather than mere common or garden injustice. On reflection, however, there is some cause for optimism. There is doubtless injustice in having been convicted under a law which was wrong and it may well be that if a case does get in front of the Court of Appeal, an appeal would be allowed, but that is not a foregone conclusion. When the Supreme Court’s predecessor last changed the criminal law in this way (to make it no longer possible to charge indecent assault for sexual intercourse with a child under 16 when the offence of unlawful sexual intercourse was time barred⁸¹), when an appeal did reach the Court of Appeal, it was allowed.⁸² That was a conviction, though, which was obtained by an abuse of the process of the court and the conviction was inevitably unsafe.⁸³ That the PAL principles were relied upon does not mean that conviction would not have followed a jury direction consistent with the restated principles of secondary liability, thus the conviction might not be unsafe. The Supreme Court has attempted to close the door on appeals based on the injustice of the application of mistaken law (whether it succeeds will be a different matter) but it has certainly not closed the door on appeals where D2 would not have been convicted under the restated principles. There will doubtless be a lot of applications for leave to appeal out of time, and applications to the Criminal Cases Review Commission, but it will be interesting to see how many of them reach the Court of Appeal.

The Issue of Intent

Although the case does not mention *Woollin*⁸⁴, the firm comments made about foresight of consequences being “evidence from which a jury can infer the presence of a requisite intention”⁸⁵ must surely bolster the Court of Appeal (Criminal Division)’s understanding of Lord Steyn’s judgment in *Woollin* in *Matthews and Alleyne*⁸⁶, that evidence, even of a virtually certain consequence which the defendant foresaw, is still only evidence from which a jury can find intent rather than being within the legal definition of intent. It certainly makes it extremely unlikely that the current Supreme Court will widen the legal definition of intent to include foresight, however likely the consequence.

⁷⁸ See for instance *R v Mitchell* (1977) 65 Cr App R 185 CA(Crim Div), p 189 quoted in [2016] UKSC 8, [100].

⁷⁹ [2016] UKSC 8, [100].

⁸⁰ Prof. Spencer’s article is sadly as true now as it was a decade ago: J.R. Spencer, “Does our present criminal appeal system make sense?” [2006] Crim LR 677.

⁸¹ *R v J* [2004] UKHL 42; [2005] 1 AC 562.

⁸² As in the case of *Caley-Knowles* [2006] EWCA Crim Div 1611; [2007] 1 Cr App R 13.

⁸³ The Court of Appeal “shall allow an appeal against conviction if they think that the conviction is unsafe” (s.2(1) Criminal Appeal Act 1968 as amended).

⁸⁴ *R v Woollin* [1999] 1 AC 82, HL.

⁸⁵ [2016] UKSC 8, [83] and see also [40], [66], [73] and [86].

⁸⁶ *R v Matthew and Alleyne* [2003] EWCA Crim 192; [2003] 2 Cr App R 30.

Impact beyond England and Wales

It is important not to forget that this was not just a domestic appeal; the Privy Council has also ruled and the effect on Commonwealth jurisdictions will, it is hoped, be great. The Court rightly notes that the Australian case of *Johns*⁸⁷ was heavily relied upon in *Chan Wing-Siu* and the courts in Australia have been bound by the Australian High Court decision of *McAuliffe*⁸⁸ which adopted *Chan Wing-Siu*, most recently in the South Australian Court of Criminal Appeal's decision *Spilios*⁸⁹. Although this article has criticised some of the Court's analysis of how PAL developed and continued, the Court's reasoned disposal of PAL is generally excellent and the conclusion is, it is submitted, extremely welcome in spirit and substance. It is hoped that the High Court of Australia in particular bears *Jogee* in mind when next it considers PAL (or "extended common purpose liability" as it is there referred to).

In the domestic context it is submitted that the judgment in *Jogee* sets a high standard for judicial approach, thinking and writing which it is hoped the courts continue to strive for.

I am indebted to the other counsel for *Jogee* (Felicity Gerry QC, Adam Wagner and Diarmuid Laffan) as well as Dr Matthew Dyson for the work put into preparing materials for the Supreme Court, many of which have been drawn upon to prepare this case note.

CATARINA SJÖLIN*

⁸⁷ *Johns v The Queen* [1980] HCA 3; (1980) 143 CLR 108.

⁸⁸ *McAuliffe v R* (1995) 183 CLR 108, HCA.

⁸⁹ *R v Spilios* [2016] SASCFC 6. There is currently an application for leave for this case to go to the Australian High Court (the highest Australian court).

*Senior Lecturer at Nottingham Law School, Nottingham Trent University, Barrister, Door Tenant at 36 Bedford Row, London, Junior Counsel for Ameen Jogee in the Supreme Court.

DISPUTING THE INDISPUTABLE

Genocide Denial and Freedom of Expression in the *Perinçek v Switzerland* (Grand Chamber) Judgment of the European Court of Human Rights

INTRODUCTION: A JURISPRUDENTIAL LANDMARK?

In the long and animated debate about content and limits on the freedom of expression, as protected by Art. 10 of the European Convention on Human Rights (ECHR or ‘the Convention’),¹ the recent European Court of Human Rights (ECtHR or ‘the Court’) Judgment in the *Perinçek v. Switzerland* case² seems destined to be viewed as a landmark in Strasbourg’s jurisprudence on the matter. In particular, the decision is crucial in order to understand the potential collisions between the freedom of expression and the legislation of different European states criminalizing, to different extents, the ‘denial’ of mass atrocities – or ‘denialism’,³ as widely used to designate conduct ranging from the mere negation of genocide, to the “justification, approval or gross minimisation”⁴ of core international crimes⁵ (out of the scope of this definition, instead, remains the phenomenon of ‘revisionism’⁶).

The Grand Chamber of the ECtHR rendered its judgment in *Perinçek* on 15 October 2015. In so doing, the Court both acknowledged and expanded many of the arguments previously developed by the Court’s second Section.⁷ The Court concluded that the applicant’s conviction for having denied the *legal* characterisation of the Armenian massacre of 1915 as genocide, had violated his right to freedom of expression, as guaranteed by Art. 10 of the ECHR. In considering the specific elements of the case, the Chamber found that the criminal conviction was not “necessary in a democratic society”.⁸

As a preliminary matter of fundamental importance, it must be noted that the term ‘genocide’ in international criminal law assumes a very specific meaning, in which the constitutive element and distinctive feature of the offence – itself the object of endless scholarly debates – is its *dolus specialis*, which is constituted by the “intent to destroy,

¹ Article 10 of the ECHR states: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 221).

² ECtHR, *Perinçek v. Switzerland* [GC], Appl. No. 27510/08, Judgment of 15 October 2015.

³ See L. Hennebel and T. Hochmann (eds), *Genocide Denials and the Law* (Oxford: OUP, 2011); R. Kahn, *Holocaust Denial and the Law: A Comparative Study* (New York: Palgrave-Macmillan, 2004); E. Fronza, *Il negazionismo come reato* (Giuffrè 2012); P. Behrens, ‘Genocide Denial and the Law: A Critical Appraisal’ (2014) 21, *Buff. Hum. Rts. L. Rev.* 27; G. Lewy, *Outlawing Genocide Denial: The Dilemmas of Official Historical Truth* (University of Utah Press 2014).

⁴ Qualifications of relevant conducts of denialism vary from document to document. *Inter alia*, see Article 1 of the Framework Decision 2008/913/JHA of 28 November 2008 of the Council of the European Union on “combating certain forms and expressions of racism and xenophobia by means of criminal law” (OJ L 328/55, 6 December 2000) and Article 6 of the Additional Protocol to the Convention on Cybercrime “concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems” (European Treaty Series No. 189, 2466 UNTS 205).

⁵ The term ‘core crimes’ is employed in the meaning attributed to it by the International Criminal Law scholarship, to designate Genocide, Crimes Against Humanity, War Crimes and the Crime of Aggression as defined (or, for the last, to be defined) in the Rome Statute of the International Criminal Court. See A. Cassese, *International Criminal Law* (Oxford OUP 2013); Bassiouni M. Cherif, *International criminal law. Vol. 1, Sources, subjects, and contents* (M. Nijhoff Pub 2008); G. Werle and F. Jessberger, *Principles of international criminal law* (OUP Oxford 2014).

⁶ See D. Lipstadt, *Denying the Holocaust: The growing assault on truth and memory*. (Simon and Schuster, 2012) and M. Shermer and A. Grobman, *Denying history: who says the Holocaust never happened and why do they say it?* (Univ of California Press 2009).

⁷ ECtHR, *Perinçek c Suisse*, Appl. no. 27510/08, 17 December 2013.

⁸ ECtHR, *Perinçek v. Switzerland* [GC], App no 27510/08, 15 October 2015, § 280.

in whole or in part, a national, ethnical, racial or religious group, *as such*” [emphasis added].⁹ For the first time in the ECtHR’s history, however, the Court deals with the criminalisation of the denial or gross minimisation of a genocide other than the *Shoah*. Further, in contrast with its previous case law on Holocaust denial, the Court disentangles the conflict between the criminal protection of the dignity of victims and the freedom of expression of the applicant striking the balance in favour of the second.

Before considering whether the judgment in *Perinçek* constitutes a turning point in ECtHR jurisprudence, and before analysing the elements and rationales of the judgment, it is necessary to put the facts of the case under closer scrutiny.

THE FACTS: PERINÇEK’S STATEMENTS ABOUT THE ARMENIAN ‘GENOCIDE’ AND HIS CONVICTION IN SWITZERLAND.

The case originated from statements made in 2005 by Mr. Doğu Perinçek, a Turkish citizen, doctor of laws and chairman of the Turkish Workers’ Party. Mr. Perinçek, at public political events in Switzerland, expressed the view that atrocities inflicted against the Armenian minority by the Ottoman Empire during the years from 1915 had not amounted to genocide.

More precisely – since the nature of the statements is crucial for the judgment – Perinçek, during a press conference in Lausanne, made the following assertion:

Let me say to European public opinion from Bern and Lausanne: the allegations of the ‘Armenian genocide’ are an *international lie* [emphasis added]. Can an international lie exist? Yes, once Hitler was the master of such lies; now it’s the imperialists of the USA and EU! [. . .] The documents show that imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks and Kurds defended their homeland from these attacks.¹⁰

Subsequently, at a conference in Opfikon (in the Canton of Zürich), Perinçek added that, prior to the societal tensions of 1915, the Kurdish and the Armenian problems “above all, did not even exist”.¹¹ Finally, at a rally in Köniz, he claimed, in pertinent part, the following:

In secret reports the Soviet leaders said – this is very important – and the Soviet archives confirm that at that time there were occurrences of ethnic conflict, slaughter and massacres between Armenians and Muslims. But Turkey was on the side of those defending their homeland and the Armenians were on the side of the imperialist powers and their instruments [. . .] there was no genocide of the Armenians in 1915. It was a battle between peoples and we suffered many casualties . . . the Russian officers at the time were very disappointed because the Armenian troops carried out massacres of the Turks and Muslims”.¹²

For having made these declarations, the Switzerland-Armenia Association lodged a criminal complaint against Mr. Perinçek in July 2005. In March 2007, the Lausanne

⁹ Article 6, Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998. See, *ex multis*, K. Ambos, ‘What does ‘intent to destroy’ in genocide mean?’ in *Intl. Rev. of the Red Cross*, 91(876) 2009, 833–858; P. Akhavan, *Reducing genocide to law: definition, meaning, and the ultimate crime* (Cambridge University Press, 2012); P. Behrens and R. Henham (eds.), *The criminal law of genocide: international, comparative and contextual aspects* (Ashgate, 2007); W. Schabas, *Genocide in International Law: the Crimes of Crimes* (Cambridge University Press, 2000).

¹⁰ *Ibid.*, § 3.

¹¹ *Ibid.*, § 14.

¹² *Ibid.*, § 16.

District Police Court convicted the applicant of “racial discrimination” pursuant to Art. 261 *bis* § 4 of the Swiss Criminal Code, which provides, as follows:

“Any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity [. . .] is liable to a custodial sentence not exceeding three years or to a monetary penalty”.

Perinçek was ordered to pay a fine of 12,000 CHF, or, in the alternative, to serve a jail term of thirty days imprisonment. Subsequently, Mr. Perinçek lodged an appeal with the Criminal Cassation Division of the Vaud Cantonal Court, but that was dismissed. The same outcome followed a second appeal before the Federal Court, in December 2007.¹³

In the appeal, the applicant submitted that his statements were not motivated by racist sentiments, that there was no consensus on the causes of the events of 1915, and that he only negated their *legal* characterisation as genocide. In addition, he insisted that there had been no definitive judgment from any international court or specialist commission acknowledging this legal characterisation.¹⁴

In response, the Federal Court found, on the contrary, that there was sufficient political recognition, scientific agreement and “broad consensus within the community” on the qualification of the events as “genocide”. According to the Court, the appellant’s declarations were not intended to contribute to the historical debate, as was shown by the fact that, during the hearings, Perinçek affirmed that he would never have considered changing or altering his views on the events in question, even had a neutral panel of experts have come to the opposite conclusion, by qualifying those events as genocide.¹⁵ Furthermore, the Swiss court agreed with the Police Court’s conclusion that the appellant’s motives were indeed of a racist and nationalistic character, since he depicted the Armenians as “aggressors”, and sided with Taalat Pasha (one of the central figures of the events of 1915, who promoted arrests and deportations of the Armenian minority, and who was widely considered the main perpetrator of crimes against them).¹⁶

Finally, grappling with an issue extensively discussed even in the ECtHR’s judgment in late 2015, the Federal Court also dwelt on the centrality of Holocaust denial in the drafting of Art. 261 *bis* of the Swiss Criminal Code. The Court indicates, in a seemingly methodological analogy, that the legal basis for the criminalisation of Holocaust denial dictates the reasoning that the courts must adopt when considering the denial of other genocides.¹⁷ Indeed, whilst it recognised that the desire to combat negationist and revisionist opinions in relation to the Holocaust was a central factor in the drafting of Article 261 *bis* § 4, the Federal Court affirmed that the Article applies to *any* genocide and crime against humanity about which there is “general agreement” in respect of the facts and their legal characterisation, when such agreement be “comparable” to that regarding the Holocaust, that is, an “*indisputable*” (emphasis added) historical fact.¹⁸

¹³ *Tribunal fédéral*, 12 December 2007, ATF 6B_398/2007, av. at <http://www.bger.ch>.

¹⁴ *Ibid.*, § 4.3.

¹⁵ *Ibid.*, § 5.1.

¹⁶ *Ibid.*, § 5.2.

¹⁷ *Ibid.*, § 3.4.3.

¹⁸ *Ibid.*, § 3.4.1.

JUDGMENT OF THE GRAND CHAMBER

Perinçek lodged his application with the ECtHR in June 2008, complaining that his criminal conviction had breached his individual right to freedom of expression. On 13 December 2013, judges of the second Section of the Court held that there had been a violation of Article 10 of the Convention. After this first decision, the Swiss Government requested the case be referred to the Grand Chamber. The request was accepted, and the Grand Chamber's judgment was delivered on 15 October 2015.

The Judgment directs different, and incisive, argumentation to the attention of the reader. The Strasbourg judges analyse, firstly, the issue of the applicability of art. 17 ECHR, also known as the 'abuse clause', frequently employed to dismiss applications related to genocide denial. Secondly, the Court dwells on the three requirements which must be respected in order to hold State interferences with freedom of expression to be compliant with the ECHR. These requirements are: lawfulness, pursuit of a legitimate aim, and necessity in a democratic society. The ECtHR then explains the hermeneutical parameters which should be followed in making this evaluation.

Finally, the judgment seems to underline the special regime surrounding Holocaust denial, seen as a *unicum* that, for political and institutional reasons, attracts a more restrictive approach, and a lesser protection afforded the right to expression.

RESTRICTION OF THE SCOPE OF APPLICATION OF THE 'ABUSE CLAUSE'

Article 17 ECHR states as follows: "nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

Clearly, article 17 aims to exclude from protection by the Convention the exercise of the freedoms established therein, when the activity under scrutiny is aimed to destroy any of the rights set forth in the Convention itself. The provision is reminiscent of the *vexata quaestio*, long debated in legal and penal theory, which concerns a 'democracy capable of defending itself' from totalitarian activities (of Weimarian memory),¹⁹ as well as of the old concept of 'militant democracy'²⁰ (about which, see further below, as the last part of this analysis).

Actions falling under Article 17, are, at the same time, beyond the scope of the ECHR's subject-matter. The important procedural implication of the application of article 17 therefore is that, when a complaint is based on conduct which expresses these 'anti-Conventional' aims, it does not get to the stage of examination on the merits, and, in cases of denialism, it is not assessed under Article 10 §2 ECHR (restriction to the freedom of expression). On the contrary, a complaint made in such cases is declared inadmissible after a *prima facie* review (the so-called 'guillotine effect').²¹

The ECtHR has uniformly applied article 17 in order to acknowledge the legality of criminal sanctions against opinions which run "counter to the basic values underlying the Convention".²² In this category the Court has included a number of prohibited

¹⁹ See H. Heller, *Staatslhre* (J.C.B. Mohr, 1983); Kelsen, *On the essence and value of democracy* (N. Urbinati and C. Invernizzi Accetti eds., Rowman & Littlefield Pub., 2000); C. Schmitt, *Constitutional theory* (J. Seizer tr., Duke Uni. Press, 2008); ID., *The crisis of parliamentary democracy*, (E. Kennedy tr., Mit Press, 1988); D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford, OUP 1999).

²⁰ K. Loewenstein, 'Militant Democracy and Fundamental Rights', in *Am. Polit. Sci. Rev.*, 31 3 (1937): 417–432.

²¹ G. Cohen-Jonathan, 'Le droit de l'homme à la non-discrimination raciale', 46 *RTDH* (2001) 665.

²² European Commission of Human Rights, *Kühnen v. Federal Republic of Germany*, 12194/86, 12 May 1988, § 1.

expressions, ranging from the negation of “clearly established” historical facts or crimes against humanity, to the “justification of war crimes” such as torture or summary executions, or the “glorification of war crimes, crimes against humanity or genocide”.²³

In the growth of racist discourses in contemporary Europe, expressions of this kind are unfortunately all-too-frequent. However, most of the cases in which the Court has applied Article 17 have had one aspect in common: they all related to one specific type of denialism, that is, the denial of the Holocaust.²⁴

To better understand the implications of the *Perinçek* decision, and following a scheme proposed by the most accurate literature on the matter,²⁵ the interpretative orientations by the Court of Article 17 can be divided in different stages. Characteristic of the first phase is that Article 17 never comes into play, except for two early cases in the former European Commission of Human Rights;²⁶ even cases of anti-Semitic activities are dismissed after an Article 10 merits examination.²⁷ In the second stage, the abuse clause is used as an interpretative instrument in support of reasoning articulated under the framework of Article 10, on the one hand, while, on the other, the same clause is construed as applicable not only to activities aimed at the “destruction of the freedoms set forth in the Convention”, but also – using a far broader concept – to those running counter to its “basic values” and “spirit”.²⁸

In the third stage, the Court increases consistently its use of Article 17, giving rise to the previously-mentioned ‘guillotine effect’ in many cases. In addition, the exclusion of evaluations under the Conventional dispositions concerning the freedom of expression seems to be attached to Holocaust denial, as such, and “divorced from a finding of racism”.²⁹

In the *Perinçek* judgment, the Grand Chamber thus expounds important arguments on the applicability of the abuse clause. Firstly, the Chamber underlines that Article 17 is only applicable “on an exceptional basis and in extreme cases”.³⁰ According to the judges, when freedom of expression is at stake, resort to the clause is legitimate only if it is “immediately clear” that the applicant sought to employ his right to freedom of expression for ends undoubtedly contrary to the values of the Convention. Therefore, in the Court’s view, the decisive point under Article 17 is whether the applicant’s statements “sought to stir up hatred or violence”, and whether, by doing so, he attempted “to rely on the Convention to engage in activities aimed at the destruction of the rights and freedoms laid down in it”, deflecting and capsizing the function of these rights.³¹ On their merits, the Court finds that the applicant’s statements were not motivated in order to incite hatred of the Armenian people, and that he had not expressed contempt towards the victims of the events of 1915. On this basis, the Chamber concludes that the

²³ See, inter alia, ECtHR *Lehideux and Isorni v. France*, [GC] App No 24662/94, 23 September 1998, § 47; *Janowiec and Others v. Russia*, App No 29520/09, 16 April 2012, § 165; *Garaudy c. France*, App. No 65831/01, 24 June 2003, § 1; *Orban and others v. France*, App No 20985/05, 15 January 2005, § 35; *Fáber v. Hungary*, App No 40721/08, 24 July 2012, § 58.

²⁴ See, inter alia, ECtHR, *F. P. v. Germany*, App No 19459/92, 29 March 1993; *Walendy v. Germany*, App No 21128/92, 11 January 1995; *Remer v. Germany*, App No 25096/94, 6 September 1995; *Nationaldemokratische Partei Deutschlands v. Germany*, App No 25992/94, 29 November 1995; *Rebhandl v. Austria*, App No 24398/94, 16 January 1996; *D. I. v. Germany*, App No 26551/95, 26 June 1996; *Hennicke v. Germany*, App No 34889/97, 21 May 1997; *Nachtmann v. Austria*, App No 36773/97, 9 September 1998.

²⁵ P. Lobba, ‘Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime’ in *EJIL*, 26.1 (2015), 237–253.

²⁶ ECtHR, *Parti Communiste d’Allemagne c. Allemagne*, Appl No 250/57, 20 July 1957; *Glimmerveen and Hagenbeek v. the Netherlands*, Appl Nos 8348/78 and 8406/78, 11 October 1979.

²⁷ ECtHR, *Lowes v. United Kingdom*, Appl. No. 13214/87, Decision of 9 December 1988.

²⁸ ECtHR, *Kühnen v. Federal Republic of Germany*, *supra* note 19.

²⁹ P. Lobba, ‘Holocaust Denial’, *supra* [22], [241].

³⁰ ECtHR, *Perinçek v. Switzerland* [GC], *supra* [2], § 114.

³¹ *Ibid.*, § 115.

applicant had not used his freedom of expression for ends contrary to the text and spirit of the Convention and, in consequence, that there is no reason to reject his application under Article 17.³²

Thus, apparently, the applicability of the abuse clause (in opposition to what has been seen in the third of the interpretative stages analysed here) returns to be framed as a mechanism of *extrema ratio*, as conditioned by a finding of incitement to hatred, or violence on the basis of racist motivations, or contempt toward victims of mass atrocities.

LIMITATIONS OF THE FREEDOM OF EXPRESSION: LAWFULNESS AND PURSUIT OF A LEGITIMATE AIM

After excluding the applicability of Article 17, the Grand Chamber proceeds to analyse the merits of the case pursuant to Article 10 ECHR. As happens with other rights set forth in the Convention, regarding which there can be a number of exceptions, even the freedom of expression can be limited, and its exercise subjected to derogations. In particular, under Article 10 § 2, and according to the previous jurisprudence of the Court,³³ a State's interference with an individual's freedom of expression – even via penal sanctions targeting expressions – does not breach the ECHR system of protection if it satisfies a threefold test: in order to comply with the ECHR, an interference must: a) be prescribed by the law, b) pursue a legitimate aim, and c) be necessary in a democratic society.

As to the first point of this threefold test, the Chamber considers that, in case of penal norms, the lawfulness of the interference is not assured by the mere existence of a legal prescription. A norm, in fact, cannot be regarded as “law” unless it is formulated with sufficient precision to guarantee, to the person concerned, both accessibility and foreseeability as to the criminal consequences of her or his actions. The judges, thus, recognise that the disposition of Article 261§4 of the Swiss Criminal Code, with its use of the term ‘genocide’ to refer to actions and events that had never been adjudicated by an international criminal tribunal, can give rise to doubts. However, the Grand Chamber takes into account that the Swiss National Council had previously recognised the Armenian genocide and, despite the few precedents in the case law, concludes that the applicant, lawyer and a well-informed politician, could have suspected that uttering his statements in Switzerland would have resulted in criminal liability.³⁴ The first tier of the test, hence, for the judges is satisfied.

With reference to the second requirement – the pursuit of a ‘legitimate aim’, the Grand Chamber analyses the alignment of the Swiss conviction with the two exceptions which potentially justify the State's interference with the freedom of expression: the ‘protection of the rights of the others’ and the ‘prevention of disorder’.

For the first – the rights of others, the Grand Chamber draws a distinction between protection of the dignity of the deceased and surviving victims of the events of 1915, on the one hand, and on the other, of the dignity, “including the identity”,³⁵ of present-day Armenians, this latter identity being profoundly based on their view of those events as

³² *Ibid.*, § 104.

³³ See J. F. Flauss, ‘The European Court of Human Rights and the Freedom of Expression’, *Ind. L. J.*, 84 (2009), 809; H. Cannie and D. Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?’ *Neth. Q. Hum. Rts.*, 29 (2011), 54.

³⁴ ECtHR, *Perinçek v. Switzerland* [GC], *supra* [2], § 140.

³⁵ *Ibid.* § 155.

a genocide. The Court thus maintains that, by disputing a legal qualification of events, the applicant did not seek to cast the victims in a negative light or diminish their dignity or humanity. At the same time, the Chamber finds that the State's interference with the applicant's statements was intended to protect identity, and thus – in the reasoning of the Court – the dignity of present-day Armenians.³⁶

More problematic was the Swiss allegation that the applicant's conviction was aimed at the prevention of disorder. In the Convention, the wording related to the concept of public order differs: some articles contain the phrase the 'prevention of disorder',³⁷ while others speak of 'interests', 'protection', and 'maintenance of public order'.³⁸ The Court reflects on this differentiation, recalling two different and underlying *notions*³⁹ of public order: a material concept, substantially denoting the prevention of riots and public disturbances, and an 'ideal' concept, encompassing control over the body of "political, economical and *moral* principles necessary to the maintenance of the social structure" [emphasis added].⁴⁰ On this matter, the Court states that, in cases of interference with rights protected by the Convention, the notion of 'order' must be interpreted restrictively, that is, according to the first, material concept. Consequently, the Court concludes that in the Swiss judgments there is no evidence supporting the concern that, in the time and context of the public events at which the applicant made his statements, they could have led to public disturbances, unleashed serious tensions or given rise to clashes.⁴¹ The Court, consequently, is not satisfied with the second element of the compliance test.

THE REQUIREMENT OF 'NECESSITY IN A DEMOCRATIC SOCIETY'.

The last and most problematic requirement under examination is the necessity of the State's interference in a democratic society. The assessment of the Grand Chamber is explicitly meant to find a balance between two polarities: the exigencies of the protection of groups whose identity and dignity is sensitively connected to past events of mass victimization (indirectly ascribable to the protections of Article 8 of the Convention), on one hand,⁴² and on the other the freedom of expression of the applicant (directly protected by Article 10).

The Grand Chamber makes clear that the freedom of expression is an essential foundation of a democratic society, of which pluralism and tolerance are constitutive elements. Hence, this freedom applies not only to expression of opinions that are positively received or regarded as inoffensive, but also to those that "offend, shock or disturb".⁴³ In this light, the key to the balancing operation is the presence, or lack, of a "pressing social need" in favour of the State's interference.

The judges, in recalling the case law of the ECtHR and applying it to the specificities of the case at hand, subsequently expose several parameters with which to evaluate

³⁶ *Ibid.* § 157.

³⁷ See Articles 10 § 2, 8 § 2 and 11 § 2 ECHR.

³⁸ See Articles 9 § 2 of the Convention, 1 § 2 of Protocol No. 7 and 2 § 3 of Protocol No. 4.

³⁹ On the controversial interpretation of the notion of 'public order' in Criminal Law, see J. Feinberg, *Harmless wrongdoing: The moral limits of the criminal law* (OUP New York; Oxford, 1990); M. S. McDougal and H. D. Lasswell, 'The identification and appraisal of diverse systems of public order', in *AJIL*, 53 1 (1959), 1–29; S. Moccia, (entry) 'Disposizioni a tutela dell'ordine pubblico' in *Enc. Giur.*, XXII, Roma, 1990.

⁴⁰ ECtHR, *Perinçek v. Switzerland* [GC], § 147.

⁴¹ *Ibid.*, § 153.

⁴² Article 8, "Right to respect for private and family life", European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* [1].

⁴³ ECtHR, *Perinçek v. Switzerland* [GC], § 196 (i).

whether or not, and if so, to what extent, the ‘democratic’ necessity of the State’s interference, as made sustainable by the likelihood of the recurrence of a pressing social need, can prevail over what otherwise would be the imperative of the freedom of expression. Among these parameters, some results are decisive.

Firstly, the Chamber looks at the characteristics of the applicant’s statements. The decisive point is whether the statements he made belonged to a type of expression entitled to a particularly high protection under Article 10 of the Convention. Expressions on matters of public interest, such as historical controversies – provided they do not amount to a call for violence, hatred or intolerance – fall within this category. The Grand Chamber found that Mr. Perinçek’s statements, even if he did not adopt a ‘scholarly’ methodology, but instead a political approach, had been characterized by this element of public interest, and that they were of a historical, legal and political nature.⁴⁴

Secondly, the judges assess the offensiveness of the expressions, that is, whether they could have been viewed as a justification of violence or as a call to hatred or intolerance, or if they cast in a negative light entire ethnic groups, and, ultimately, their capacity – even indirect – to lead to harmful consequences. The Court, therefore, finds that Mr. Perinçek did not express contempt or hatred for the victims of the events of 1915, since he noted that Turks and Armenians had lived in peace for centuries, before falling victim of “imperialist” manoeuvring. In the declarations under scrutiny, there is no sign of abusive terms with respect to Armenians, or attempts to stereotype them negatively.⁴⁵ These arguments are particularly relevant, since they seem to indicate the necessity of some incitement to hatred or a justification of violence, at least indirect, to make such expressions punishable. On the other hand, it is sufficient to note the fact that the applicant also depicted both Turks and Muslims as victims of massacres carried out by the Armenians,⁴⁶ to give an example of how controversial and discretionary the interpretation of the concept of ‘justification’ can be.

Thirdly, the Court analyses the geographical and temporal contexts of the interference. This assessment is crucial in order to review the existence of the above-mentioned ‘pressing social need’ of the State’s interference. In this evaluation, the Grand Chamber makes clear that a State’s historical experience can carry significant weight and, considering in particular the cases of Holocaust denial, the first factor grounding the criminalization of negationist opinions is not the defence of the historical truth, but rather the intrinsic ‘dangerousness’ of the denial in respect of the national and regional contexts in which it is expressed. In this respect, the Court finds that, whilst the controversy sparked by the applicant was external to Swiss political life, the national courts had made no reference to the Turkish context, in which the Armenian minority claims to have suffered hostility and discrimination. For the judges, therefore, although the protection of human rights implies a universal aspiration, the demand of proportionality inherent in the phrase “necessary in a democratic society” requires a “rational connection between the measures taken by the authorities, and the aim they sought to result through these measures”. Similarly, this approach applies to the temporal distance between the incriminated expressions, and the events objected to: the Court considers this lapse of time a relevant criterion of assessment, suggesting that the need for a heightened regulation of the statements contesting tragic and traumatic events “is bound to recede with the passage of time”.⁴⁷

⁴⁴ *Ibid.* §§ 206 ss.

⁴⁵ *Ibid.* §§ 230 ss.

⁴⁶ *Ibid.* § 16.

⁴⁷ *Ibid.* § 250.

Finally, in recalling only a brief part of the corresponding reasoning on the point made by the Second Section, the Grand Chamber problematizes the assertion of the Swiss courts concerning the existence of a ‘general consensus’ as regards the relevant events, the object of the statements and their legal qualification. Through a comparative analysis, it concludes that only a minority of States in the Council of Europe have officially recognised the Armenian genocide, and only some of those have opted for the criminalization of any particular genocide denial. The Court also adds that, in the comparative spectrum, Switzerland stands at one end, since it is the only State that chosen to criminalize the denial of any genocide or crime against humanity, without even requiring such denial to be made in a manner likely to incite to violence or hatred.⁴⁸

Taking into account all these elements, the Court concludes that “it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case”, in breach of Article 10 of the Convention.⁴⁹

CRITICAL REMARKS

After this brief overview and analysis, it is possible to assert that this judgment, even if not constituting a milestone, represents a breakthrough in Strasbourg jurisprudence.

Primarily, the Court’s restriction of the scope of application of the abuse clause constitutes a positive note, at least because during the phases of expansive interpretation of Article 17, the ‘guillotine effect’ “beheaded” not only the scrutiny of many cases, but also the progressive refinement of the hermeneutical parameters used by the Court to balance the rights at stake. Something similar can be said for what concerns the demand of a ‘qualified’ manifestation of denialism, that is the presence of elements of incitement or offensiveness to the dignity of the victims or their descendants, in order to acknowledge its punishment.

On the other hand, the Court carefully and repeatedly distinguishes the case under examination from the cases on Holocaust denial and, far from outlining a comprehensive approach to the principles to be applied, leaves untouched the exceptional regime surrounding those cases, that assume the contours of a *sui generis* denialism, in which the existence of international criminal judgments, the ‘sensitive’ national and regional environments in the States in which Nazism and Fascism have left their scars, along with the importance of the Holocaust for the identity of contemporary Europe, justify several presumptions. The detrimental effect of these presumptions is to eclipse the tests of concrete offensiveness and harm that should always ground the use of criminal law in every democratic legal order. As an example, it suffices to look at the *Witzsch v. Germany* [No.2] case, to register that the Court even used the abuse clause to approve a conviction based on an opinion contained in private correspondence destined to a scholar; opinion, in addition, not aimed to object to the existence of extermination of the Jews, but the role of historical figures in the planning of the techniques for the mass killings.⁵⁰

While considerations about the uniqueness of the Holocaust in modern history entirely match the historical and political points of view of this comment, what appears problematic in the mentioned case is the transposition of these considerations into the legal sphere, in particular, for what concerns the goals of criminal law.

⁴⁸ *Ibid.* § 257.

⁴⁹ *Ibid.* § 280.

⁵⁰ ECtHR, *Witzsch v. Germany* (2), Appl. No. 7485/03, 13 December 2005.

In addition, the attempts to contextualize the denial offence in time and space, to qualify it for its offensiveness or elements of incitement, and the endeavour to attach special significance to the presence or lack of a judgment by an international tribunal, seem more oriented to the reiteration of the mentioned distinctions between different 'denialisms', than aimed to establish firm parameters with general validity. Some questions on this point arise naturally, e.g., if the time lapse between the events and the incriminated assertion becomes a decisive criterion, should one suppose that punishment for denial of the Holocaust will be one day outlawed? Further, if the geo-political environment of the statements is determinant, is it admissible to deny the Rwandan genocide if the accused speaks in Northern Europe? And, finally, given the controversies on the special intent of the crime of genocide, did Perincek's statements not negate at least crimes against humanity? Clearly, once the path to the admissibility of opinion-criminalization is chosen, every related parameter becomes equally controversial and questionable.

Today, therefore, the reasons that contrast with the admissibility of these sorts of uses of the criminal law are of a different nature: technical, empirical and axiological.

Firstly, criminal law is only one of the possible instruments with which to intervene to prevent or deter racism, xenophobia, anti-Semitism and 'hate speech'. Before other instruments, such as respect for civil and political mobilizations, cultural commitments, historical education, collective memory and public debate, criminal law only represents a 'shortcut'.⁵¹ Moreover, the criminal law constitutes a legal instrument that differs from any other, since it protects 'juridical goods' through the lesion of the most important juridical good,⁵² that is personal freedom, apex of the hierarchy of protected interests in every legal order based on the rule of law. This is the reason why, since the 18th Century, the illuminist-liberal doctrine of criminal law has underlined the utmost importance of the principle of materiality and offensiveness of the crime.⁵³ When an activity is limited *sic et simpliciter* to the expression of an (eventually despicable) opinion, without such elements as incitement to discrimination, hatred or violence, it is hardly possible to qualify it as 'conduct' in the relevant meaning demanded by the mentioned principle, so as to require the lesion of a legally appreciable juridical good, as testified by the secular adage: *cogitationis poenam nemo patitur* (no one can be punished for her or his thinking).

Secondly, notwithstanding the intentions of legislators, efficiency via criminal provisions targeting mere denials is more than doubtful. The criminal law 'shortcut' is probably the least efficient. The risk, in fact, is to elevate the deniers to the role of defenders of the freedom of expression, thereby increasing their audience and nurturing their claims of legitimacy, according to which institutions want to censor their dangerous 'truths'. In addition, the attempt to establish an official, indisputable historical truth contrasts with academic freedom, as well as with the epistemological methodology of science that always advances through progressive unveilings of previously undisputed assumption. In other words, history never becomes *res iudicata*.⁵⁴

Finally, separation of law and morals and democratic pluralism should push states to abstain from entrusting the criminal law with ethical prescription. When public (or private) statements simply seek to deny tragic and proven historical facts, without

⁵¹ See E. Fronza, 'The Punishment of Negationism: The Difficult Dialogue between Law and Memory', in *Vermont L. Rev.* 30 (2005), 609.

⁵² See F. Von Liszt, *Die deterministischen Gegner der Zweckstrafe* [Deterministic Opponents of Purposive Punishment], in *Die gesamte Strafrechtswissenschaft*, 13, (1893), p. 357; tr. by Iain L. Fraser, *JICJ*, 5 (2007), p. 1009.

⁵³ See L. Ferraioli, *Law and Reason. The Theory of Penal Guarantees* (Laterza, 2011).

⁵⁴ See E. Fronza and G. Gamberini, *Le ragioni che contrastano l'introduzione del negazionismo come reato*, in *Diritto Penale Contemporaneo*, av. at. <http://www.penalecontemporaneo.it>, 29 October 2013 (last accessed 10 February 2015)

elements of incitement to or glorification of mass atrocities, what can or does criminal law actually protect? Is it the dignity and identity of ethnical or religious groups at stake, or rather the identity or integrity of an institutional order? Ironically enough, the techniques of criminal legislation posing the ‘personality of the State’ at the top of the hierarchy of juridical goods deemed worthy of penal protection, are precisely the techniques utilised by authoritarian regimes. The pretension to make of democracy a ‘self-defending’ apparatus, in other words, unveils a flawed mandate, by entrusting to the criminal law what civil society should defend. As a consequence, such an approach produces the risk that any legal devices so conceived will be seized by ruling classes with authoritarian tendencies or preferences, and used to rid themselves of ‘disturbing’ oppositions.

On the contrary, facing the complexities and ethical differentiations of contemporary society, human rights justice should embrace the notion of ‘gentle law’,⁵⁵ that is, a legal order that does not impose universal and immutable truths on its consociates by protecting them with the ‘sword’ of the criminal law, but, rather, safeguards the conditions for the peaceful coexistence of the differences, and the democratic dialectics out of their conflicts.

Enhancing the axiological coherence of the European criminal systems depends therefore on an apparent paradox: to make democracy indisputable, democracy must allow itself to be disputed.

Only the future will show whether this ‘radical’ (in opposition to ‘militant’)⁵⁶ conception of democracy can find a glimmer in ECtHR jurisprudence, and whether the ECHR protection system can interact with it to prevent a sinister combination of growing hate discourses in the society and the adoption of new authoritarian tendencies in the European criminal policies. After all, borrowing the warning from George Santayana,⁵⁷ also the criminal law that cannot remember the past is condemned to reproduce it.

LUIGI DANIELE*

⁵⁵ G. Zagrebelsky, *Il Diritto Mite* (Einaudi, 1992).

⁵⁶ See K. Loewenstein, ‘Militant Democracy’, *supra* [20].

⁵⁷ “Those who cannot remember the past are condemned to repeat it” (G. Santayana, *The Life of the Reason*, Vol. 1, Charles Scribner’s Pub., New York 1905, 284).

*Magistrale Degree (LLB and LLM equivalent) *Summa cum laude*, University of Naples Federico II, Doctoral Researcher, Nottingham Law School, Nottingham Trent University and Facoltà di Giurisprudenza, University of Naples Federico II.

INNOCENT DISSEMINATION: THE TYPE OF KNOWLEDGE CONCERNED

Chau Hoi Shuen, Solina Holly v SEEC Media Group Limited
18 December 2015 (HKCFA)
(Ma CJ, Ribeiro, Tang and Fok PJJ and Mapesbury NPJ)

INTRODUCTION

In an action for defamation, a subordinate publisher with no knowledge of the libel in the work can rely on the defence of innocent dissemination. At present, *Vizetelly v Mudie's Select Library Ltd*¹ remains the century-old authority. Romer LJ's seminal judgment clarified that the relevant knowledge can arise in three *means*, i.e. actual knowledge, something in the work or surrounding circumstances that raise a suspicion of libel, or the subordinate publisher's negligence that caused his lack of knowledge. But what about the *content* of the relevant knowledge, i.e. what is meant by the word *libel*? Does it mean the statement itself, its defamatory character, or an actionable libel to which there is no valid defence (e.g. justification, honest comment, privilege or *Reynolds* defence)? As far as the UK position is concerned, it remains unsettled as to whether a subordinate publisher, who has knowledge of the defamatory material but believes that a valid defence exists, can plead innocent dissemination.² This view is supported by Lord Denning in *Goldsmith v Sperrings*, who stated that "no subordinate distributor . . . should be held liable for a libel contained in it unless he knew or ought to have known that the newspaper or periodical . . . contained a libel on the plaintiff which could not be justified or excused".³ Yet Bridge LJ in the same case did not support this view and held that a subordinate publisher relying on the defence of innocent dissemination must "show that he did not in fact know that the publication contained defamatory matter".⁴ While neither of their Lordships gave reason for this distinction, Eady J in *Metropolitan International Schools Ltd v Designtecnica Corp*⁵ considered why Bridge LJ's view should prevail. In Eady J's view, Lord Denning's proposal is problematic: how could the defendant know that a defence was bound to fail, save in the simplest of cases? How much legal knowledge is to be attributed to the defendant?⁶ All of the above views, however, are merely *obiter*, and the proposal is still arguably open to a defendant in an action for defamation. In contrast, the Hong Kong Court of Final Appeal has now firmly rejected this view and narrowed down the scope of the common law defence of innocent dissemination.

THE FACTS

In *Chau Hoi Shuen, Solina Holly v SEEC Media Group Limited*⁷, two articles in a magazine contained statements defamatory of the claimant. The magazine's cover page contained words which resembled the defamatory content. The defendant company's business was to deliver printed copies of the magazine to subscribers, but it did not

¹ *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170.

² A. Mullis and R. Parkes, *Gatley on Libel and Slander* (London: Sweet & Maxwell, 2013, 12th edition), para. 6.38.

³ *Goldsmith v Sperrings* [1977] 1 WLR 478 (CA) 487.

⁴ *Goldsmith v Sperrings* [1977] 1 WLR 478 (CA) 505.

⁵ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB), [2011] 1 W.L.R. 1743.

⁶ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB), [2011] 1 W.L.R. 1743 [69].

⁷ *Chau Hoi Shuen, Solina Holly v SEEC Media Group Limited* [2015] HKEC 2703.

deliver by itself. Instead, it gave address labels and labelled envelopes to a courier company who would take the copies to be dispatched from the printer directly. The defendant only received the left-over copies two to three days after the bulk has been dispatched. The main issue was “the nature of the knowledge possessed [or would have been acquired upon taking reasonable care] which suffices to exclude such secondary publisher from relying on the defence of innocent dissemination”⁸.

Fok PJ delivered the only reasoned judgment. His Lordship distinguished between three types of knowledge: (a) Type A knowledge is the knowledge of the gist of content; (b) Type B knowledge is Type A knowledge plus the knowledge that the content is defamatory; and (c) Type C knowledge is Type B knowledge plus the knowledge that there is no valid defence against an action for defamation thereupon. These categories represent subtle yet crucial differences. The Court decided that Type C knowledge is not required. In other words, for the purpose of the defence of innocent dissemination, the defendant’s belief that there is a valid defence to an actionable libel does not matter. However, the Court did not decide whether the requirement is Type A or Type B knowledge, because the defendant would have discovered the libelous material (i.e. at least Type B knowledge) if it had not been negligent in not inspecting the magazine at all. The Court gave five reasons.

THE JUDGMENT

The first reason was based on the same court’s earlier judgment in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*⁹. That case held that a first or main publisher is liable because of his control and knowledge of the contents of publication (i.e. Type A knowledge); it being irrelevant whether he knows that the content was defamatory (i.e. Type B knowledge). Fok PJ concluded that, since the defence of innocent dissemination was to mitigate the harshness of this strict rule, the logical result was to apply the same test of knowledge in deciding whether a subordinate publisher can avail of this defence.

The second reason was based on a reading of leading authorities. Fok PJ considered that, except for Lord Denning’s *obiter* in *Goldsmith v Sperrings*, no leading case lent support to the requirement of Type C knowledge. Neither *Emmens v Pottle*¹⁰ nor *Vizetelly* suggested that the respective defendant would have avoided if they believed that a positive defence existed. And in *Sun Life Assurance Co. of Canada v W.H. & Son Ltd*¹¹, the justices formulated the relevant knowledge requirement as a statement bearing “a libellous meaning” (Scrutton LJ) and “statements which were defamatory of the plaintiffs” (Greer LJ).

The third reason relates to practical evidential difficulties involved in successfully establishing the defence. Eady J in *Metropolitan International Schools Ltd v Designtechnica Corp* rejected the requirement of Type C knowledge because this requirement causes many problems:

“How could someone hoping to avail himself of the defence *know* that a defence of justification was bound to fail, save in the simplest of cases? How is he/she to approach the (often controversial and uncertain) question of meaning? How much legal knowledge is

⁸ Chau Hoi Shuen, *Solima Holly v SEEC Media Group Limited* [2015] HKEC 2703 [16].

⁹ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366, [2013] HKEC 1025.

¹⁰ *Emmens v Pottle* (1885–86) LR 16 QBD 354.

¹¹ *Sun Life Assurance Co. of Canada v W.H. & Son Ltd* [1933] All ER Rep 432.

to be attributed to him/her in arriving at these conclusions? What of a possible *Reynolds* defence?"¹²

Fok PJ considered that these practical difficulties "are very real and call into question the soundness of the appellant's contention that proof of Type C knowledge is required to defeat the defence".¹³

The fourth reason concerned the balance between freedom of expression and reputational protection. Fok PJ held that, if Type C knowledge is required, the subordinate publisher would then have no need to establish the traditional defences and suing him successfully would become virtually impossible. This would "skew that balance very heavily in favour of a subordinate publisher". If protection for newsvendors and distributors is desirable, the appropriate route is legislation, rather than an unprincipled or problematic common law test.

The fifth and last reason was based on an interpretation of the statutory defences of innocent dissemination in other common law jurisdictions. Neither the UK, Australia, New Zealand and Ireland require proof of an absence of Type C knowledge. The inference was two-fold: the adoption of Type C knowledge was problematic in not striking the correct balance between free speech and protection for reputation; and insofar as they codify the common law defence, the absence of Type C knowledge is not required in common law.

COMMENTARY

Although Fok PJ gave five reasons in total, the first and the fourth reasons are more directly relevant to the issue because they draw a distinction between the three types of knowledge. The other reasons either magnify empirical difficulties or assume that the common law position is settled. This part will comment on the reasons chronologically.

In giving the first reason, Fok PJ was making a teleological argument as to the proper requirement of knowledge, but this argument does not provide a definite answer. In his Lordship's view, the law concerning the first or main publisher is too harsh because Type A knowledge and control are the sufficient conditions for liability. The common law response is that, if the publisher has insufficient control (i.e. a subordinate publisher), then he must have additional knowledge for liability to attach. Otherwise the subordinate publisher is "innocent". But this logic does not prefer Type B or Type C knowledge to one another because both go further than Type A knowledge.

The second reason is peripheral in that the lack of authority represents the law as it stands. This begs the question whether there is a good reason to extend the case law, in accordance with the rationale of the defence of innocent dissemination, as identified in the first reason.

Evidential difficulties raised in the third reason do not draw a clear distinction between the three types of knowledge and have been exaggerated. Note that any such evidential difficulty falls on the defendant. Such evidential difficulty arises because in most cases, only the first or main publisher is privy to the knowledge which bears on the validity of a possible defence. A distributor, for example, would not know whether the journalist reported the article in good faith (*Reynolds* defence) or whether the statement is true (justification). But there appears to be some ways to overcome this difficulty, e.g. the distributor may ask the first or main publisher to confirm that a defamatory article is

¹² *Metropolitan International Schools Ltd v Designtechica Corp* [2009] EWHC 1765 (QB), [2011] 1 W.L.R. 1743 [69].

¹³ *Chau Hoi Shuen, Solina Holly v SEEC Media Group Limited* [2015] HKEC 2703 [43].

true. Furthermore, evidential difficulty is inherent in all defences; there is little logic in negating the defence *a priori*.

In giving the fourth reason, Fok PJ supplemented the first reason by drawing a further distinction between Type B and Type C knowledge: the requirement of Type C knowledge would confer on a subordinate publisher a *de facto* immunity. Presumably, this immunity arises because the subordinate publisher can easily prove that he published the article without knowing (actually or constructively) that, if a claim for defamation arises, there is no valid defence. But this presumption is inconsistent with the third reason, i.e. it is difficult for a defendant to avail of the defence. Another possible reason is that, technically, the subordinate publisher does not know that there is no valid defence if he has not considered this issue at all. It follows that, since in most cases the subordinate publisher has insufficient time or legal knowledge to consider this issue at all, the requirement of Type C knowledge confers a *de facto* immunity. But there is an easy solution to this technicality: the defendant has the burden to prove that he reasonably believed that there was a valid defence to an actionable libel. If he did not consider this issue, he was reckless. If his view was not reasonable, he was negligent. In either case, liability attaches. There will be no issue of overly protecting a subordinate publisher if Type C knowledge is required.

Lastly, the fifth reason, similar to the second reason begs the question why the common law as it stands should not be extended. Furthermore, deducing the common law provision from an overlapping statutory provision is unreliable. If the statute does not indicate clearly, it is doubtful whether its effect is to codify, supersede, abolish or supplement the common law defence. Newly created statutory doctrines, such as the statutory indoor management rule¹⁴, often operate side by-side with an overlapping common law doctrine. Thus, in the English *Metropolitan* case¹⁵, Eady J. held that s.1 of the Defamation Act 1996 does not abolish the common law defence of innocent dissemination. The common law defence may be wider in scope than the statutory defence: for example, there is no requirement to exercise reasonable care in common law, but s.1(1)(b) requires the defendant to take reasonable care in publishing the defamatory material. It is unclear in what way these foreign statutes illuminate the common law position in the corresponding jurisdiction, and in turn the position in Hong Kong.

What type of information is needed to prove innocent dissemination?

If, according to Fok PJ, Type C knowledge is not required for the defence of innocent dissemination, then what is the correct requirement, Type A or Type B knowledge? It is submitted that, in line with the logic of *Chau Hoi Shuen*, the only possible answer is Type B knowledge. In Fok PJ's view, the publication rule is duly strict because liability *qua* first or main publisher arises if he has control and Type A knowledge. If a subordinate publisher (i.e. a publisher without sufficient control) is liable if he has Type A knowledge, the liability is even stricter. This would defeat the very underlying rationale of the defence of innocent dissemination, i.e. to offer protection to subordinate publishers. Hence, the better view is that, a publisher is liable for defamation if he has either: (i)

¹⁴ On one hand, the rule in *Royal British Bank v Turquand* (1856) 6 E. & B. 327, also known as the indoor management rule, provides that a third party acting in good faith is entitled to assume that the relevant procedures of indoor management of a company have been complied with. On the other hand, s.40(1) of the Companies Act 2006 provides that the power of the directors to bind the company, or authorise others to do so, shall be deemed, in the case of a person dealing with a company in good faith, to be free of any limitation under the company's constitution. These two doctrines overlap to a large extent with each other, but the s.40(1) does not abolish the indoor management rule. See, Peter G. Watts and F.M.B. Reynolds, *Bowstead and Reynolds on Agency* (London: Sweet & Maxwell, 2014, 20th edition), para. 8.033–8.036; Geoffrey Morse (et al), *Palmer's Company Law: annotated guide to the Companies Act 2006* (London: Sweet & Maxwell, 2007, 1st edition) para. 3.331–3.335.

¹⁵ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB), [2011] 1 W.L.R. 1743 [70].

control and Type A knowledge, i.e. he is a first or main publisher; or (ii) he has Type B knowledge, i.e. he is a “guilty” subordinate publisher.

Is the result too harsh?

Assuming that the requirement is Type B knowledge, it is submitted that the publication rule remains too harsh. Take the case of a small newsstand owner. Assume that a newspaper has incorrect breaking news and indicates so on the cover page. The owner must have spotted the magazine cover one way or another when he hands the newspaper to a customer or tidies the newsstand. He will thereby have Type B knowledge and become liable for defamation. On the one hand, the result hardly seems just to the owner. On the other hand, to avoid liability, the owner must go further than relying on the first or main publisher’s bare assertion. He has to satisfy himself that there is a valid substantive defence, e.g. that the defamatory statement is in fact true. This task is particularly burdensome for small distributors who are not expected to have the time or the expertise to assess the validity of the substantive defence. This results in undue impediment in the chain of distribution, particularly when the material appears controversial. The only solution seems to be an indemnity by the first or main publisher against an actionable libel thereon.

A possible argument to overcome the disproportionately harsh result on the in possible of Type B knowledge is that the subordinate publisher has made a *Chase*¹⁶ level 3 statement, i.e. there are grounds for investigating whether the claimant is guilty of the impugned behaviour. In such a case, the publisher can successfully plead justification if he relies on a hearsay, such as an announcement by the law enforcement authority¹⁷. The test for meaning is that which can convey to the reasonable person.¹⁸ It is arguable the same statement conveys different meanings depending the breath of information that can be reasonably expected of the statement-maker. The journalist is privy to all information pertaining to an article. In *writing* the article, he thereby conveys a *Chase* level 1 statement, i.e. that the claimant is guilty of some impugned behaviour. The subordinate publisher has just as much information as the general readers have. In *distributing* a pre-written article, he thereby conveys only a *Chase* level 3 statement. Thus, the latter should be permitted to rely on an ostensibly reliable hearsay to plead justification. Whether the newspaper/magazine makes an ostensibly reliable hearsay depends on, in particular, the reputation of the publisher.

The *Chase* classification is a recent invention compared to the defence of innocent dissemination. Thus, this argument does not appear to have been addressed in the case law. Notwithstanding, this framework and the defence of innocent dissemination are both labels to address the same underlying question: on a wide spectrum of knowledge, “at what point does the law seek to pin responsibility for such dissemination”?¹⁹

CONCLUSION

Setting aside any statutory defence for a moment, how does *Chau Hoi Shuen* and its narrow interpretation of the common law defence of innocent dissemination affect the common law position in the UK? Despite the difference in terminologies, recall

¹⁶ *Chase v News Group Newspapers* [2002] EWCA Civ 1722, [2003] E.M.L.R. 11.

¹⁷ A. Mullis and R. Parkes, *Gatley on Libel and Slander* (London: Sweet & Maxwell, 2013, 12th edition), para. 11.13, citing *Musa King v Telegraph Group Ltd* [2004] EWCA Civ 613, [2005] 1 W.L.R. 2282.

¹⁸ A. Mullis and R. Parkes, *Gatley on Libel and Slander* (London: Sweet & Maxwell, 2013, 12th edition), para.11.18.

¹⁹ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366, [2013] HKEC 1025 [118].

that Eady J in *Metropolitan* considered the same issue extensively and arrived at the same conclusion as Fok PJ in disentitling a subordinate publisher from relying on the defence if he knew the material was defamatory (untrue). In that case, his Lordship has already held that the search engine, Google, was not liable for automatically generated search results because it was not a publisher. Then his Lordship went on to consider the alternative argument that the defence of innocent dissemination was applicable. First, his Lordship held that the defence was not abolished, rather it was effectively superseded by s.1 of the Defamation Act 1996. Second, his Lordship held that Google could not rely on the defence, because a defendant who knew that the statement was arguably defamatory statements cannot plead innocent dissemination, whether or not he believed there would be a valid defence. On this interpretation, “the common law defence is much more closely in line with the statutory defence”.²⁰ With the support of the Hong Kong Court of Final Appeal, it is likely that the superior courts in the UK will follow this approach.

On the other hand, the statutory protections for subordinate publishers in the UK are far more extensive than those in Hong Kong. Section 1 of the Defamation Act provides for a statutory defence of innocent dissemination; and s.10(1) of the Defamation Act 2013 provides that a publisher can only be sued if it is not reasonably practicable to sue the first or main publisher. In contrast, neither of these provisions has been enacted in Hong Kong. Thus, it is expected that the influence of *Chau Hoi Shuen* is more limited in the UK. These statutory protections are capable of remedying any inadequacy in the protection for subordinate publishers in common law. The presence of statutory protections also explains why the UK courts have not yet decided authoritatively on the knowledge requirement of the common law defence.

Lastly, after *Chau Hoi Shuen*, what is the interaction between the common law defence of innocent dissemination and s.1 of the Defamation Act 1996? *Chau Hoi Shuen* and *Metropolitan* have brought the knowledge requirement in the common law defence and statutory defence (in s.1(1)(c)) in line with each other. The common law defence is only more advantageous to a defendant on two interpretations. First, there is no requirement to take reasonable care in publishing the defamatory material in common law. This is likely to be true, because it appears that under the formulation of *Vizetelly*, the subordinate publisher need not exercise any reasonable care in the publication, but only in ascertaining whether the material is defamatory. Second, the definition of subordinate publisher in common law is wider than “not the author, editor and publisher” as defined in s.1(2). This comparison is not straightforward. Under s.1, the defendant has to disprove that he fits into one of the “author, editor and publisher” as further defined in s. (1)(2) and s. (1)(3). This is a matter of categorization. But in common law, under the formulation of *Oriental Press Group Ltd*, he will have to satisfy both the “knowledge criterion” and the “control criterion”. This is a matter of evaluation. Alternatively, he may draw analogies from established categories of a subordinate publisher in case law, which are likely to differ from the statutory categories. The difference in these approaches is not inconceivable, although hard to exemplify.

S. H. CHAN*

*Chan, S. H., The University of Hong Kong.

²⁰ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB), [2011] 1 W.L.R. 1743 [70].

PLEDGES OVER INVENTORY IN FRANCE

Cour de Cassation Assemblée plénière Arrêt No.627 du 7 Décembre 2015
ECLI:FR:CC ASS: 2015:AP00627
(Président: M. Louvel; Avocat Général: M. Le Mesle)

In December 2015, the French *Cour de Cassation* (the ‘Supreme Court’) in plenary session handed down the final judgment in a case that had spent over four and a half years in the French judicial system. Of great importance to banks, it considered whether the preferred method of taking security over the stock of their customers was, in fact, permitted at law. To the dismay of the banking community, the Supreme Court held that the preferred method (which involved enforcement outside judicial proceedings) was not, in fact, available to financial institutions, despite having been widely used by them for several years. Whilst the effects of the judgment going forward have been rapidly rebuffed by legislative action, the case is a useful reminder to English lawyers of the complexities of taking security in non-common law jurisdictions. In particular, self-help remedies are viewed with suspicion by many foreign courts.

BACKGROUND

The facts of the case need to be understood against the backdrop of security law reform that had taken place in France in 2006.

Ordonnance No.2006–346 of 23 March 2006 (the “Ordonnance”) was passed with the aim of updating and clarifying French law security interests, including the pledge. French law, like most Civil law jurisdictions, has traditionally relied on the pledge for taking security over tangible assets. To this effect, the Ordonnance added to the French Civil Code provisions to permit the creation of a pledge over any kind of tangible movable property¹ (the “Civil Law Pledge”), being a general pledge, wide enough to include a pledge over inventory. The Ordonnance also amended the French Commercial Code, to create a more specific pledge over inventory² (the “Commercial Code Pledge”). The Commercial Code Pledge contained two limitations, however, which in practice limited its attractiveness to lenders. These were first, that it could only be used by credit institutions (something which would not pose a problem for French-based lenders used to French banking monopoly rules, but which would be a constraint to some non-traditional lenders); and second, that it could only be enforced by court procedures. The Civil Law Pledge, by contrast, was available to all creditors, but more importantly also introduced a new method of non-judicial enforcement known as the *pacte commissaire*. This new remedy allowed direct transfer of the pledged assets to the pledgee, so long as the debtor had consented to this process in advance (which of course meant such consent became a standard term of any such pledge agreement). This non-judicial enforcement was a considerable step forward from the point of view of French creditors.

Ever since the 2006 Ordonnance, there had been a certain amount of discussion in French legal circles about whether the Commercial Code Pledge offered the only procedure for banks wanting to take a pledge over inventory, or whether banks could use the wider Civil Law Pledge if they wished.³ The Ordonnance was quiet on this point (possibly because the Commercial Code Pledge was introduced at a very late stage in the

¹ Gage de biens meubles corporels.

² Gage de stocks: L.527–I Code de Commerce (the French Commercial Code).

³ See Sigman, Harry, S. and Kieninger, Eva-Marie (eds) “Cross-border security over tangibles” (21 November 2007) French section by James Leavy, at p 103.

drafting), but the prevailing view in French jurisprudence was that there was nothing to support a restrictive interpretation, and accordingly the banks could take which ever pledge they preferred.⁴ Part of the rationale behind the Ordonnance had, after all, been to make French security law more efficient and competitive for lenders.⁵ Accordingly, the practice grew of banks using the Civil Law Pledge in preference to the Commercial Code Pledge in their secured lending transactions. Although the legal opinions banks received generally contained a qualification indicating that the right to use the Civil Law Pledge in this way was unclear, in practice the banks themselves considered this little more than a minor health warning.

The position was finally questioned in the courts when the French company Recovco Affimet (“Recovco”) went into *redressement judiciaire*⁶ on 19 January 2009 and then into liquidation on 14 September 2009.

THE FACTS

The facts of the matter were straightforward and uncontested. On 17 December 2007, a non-French bank (the “Bank”) had extended a loan to Recovco. It was common ground that the Bank had taken a Civil Law Pledge over Recovco’s stock as security for the loan. On 9 January 2009, after Recovco had fallen into arrears, the Bank accelerated the loan. On 16 January 2009, the Bank notified Recovco that the Civil Law Pledge over stock had become enforceable and asserted its ownership over the stock. Three days later, Recovco was declared bankrupt and in April 2009 the Bank exercised its right to become direct owner of the pledged assets pursuant to the *pacte commissaire*.

THE DECISIONS OF THE LOWER COURTS

Recovco’s liquidator (the “Liquidator”) applied to the court to contest the Bank’s right to have chosen the Civil Law Pledge, alleging it gave a disproportionate advantage to the Bank. The Liquidator contended that it was too risky to the debtor to allow the Bank to get title to its stock upon default without going through the existing protective court procedure. The Tribunal de Commerce de Paris (the “Tribunal”)⁷ rejected this argument and held that the stock did indeed belong to the Bank. The Tribunal held that there was no absolute requirement for banks to use Commercial Code Pledge in preference to the Civil Law Pledge, as the legislation was permissive rather than prescriptive. Financial institutions “*could*” use the Commercial Code Pledge⁸ and accordingly they were free to choose between the two forms of pledge.

The Liquidator appealed to the Paris Court of Appeal, which also found in favour of the Bank in a judgment handed down on 3 May 2011.⁹ The Paris Court of Appeal held

⁴ See International Law Office article, 20 July 2007: “No provision or principle expressly prevents creditors that are eligible for a Commercial Code pledge from using a Civil Law pledge if they meet the requirements . . . [P]reventing credit institutions from using the Civil Law pledge would not be in line with the purpose of the legislation”.

⁵ See the opinion of the *avocat général* in the Cour de Cassation assemblée plénière, Arrêt No. 627, p 6; and Cour d’Appel de Paris, 27 February 2014, RG No.13/03840, pp 3–4.

⁶ Akin to English law receivership.

⁷ Tribunal de Commerce de Paris 25 June 2010, no2009082861.

⁸ “Tout crédit consenti par un établissement de crédit à une personne morale de droit privé ou à une personne physique dans l’exercice de son activité professionnelle peut [emphasis added] être garanti par un gage sans dépossession des stocks détenus par cette personne” (L527–1 Code de Commerce, as in force at the time). Translation: “All credit advanced by a credit institution to a corporate entity or a physical person in the exercise of his professional activity may [emphasis added] be guaranteed by a pledge over inventory without dispossession over stock held by this person”.

⁹ Cour d’Appel de Paris, 3 May 2011, No10/13656.

that the parties' choice of the Civil Law Pledge in the document was both explicit and perfectly legitimate and one that was supported by market practice.

The Liquidator continued his appeal, however and, on 19 February 2013, the commercial chamber of the Supreme Court¹⁰ reversed the decision of the Paris Court of Appeal, and held that if the conditions for taking a Commercial Code Pledge were satisfied, it was the only permissible method for a financial institution to create a pledge without dispossession over inventory, and that accordingly the Civil Law Pledge taken by the bank in Recovco was null and void. If creditors wished to use the *pacte comissoire* in the Civil Law Pledge, then they must create a pledge with *dispossession*. This approach in itself was likely to be impractical, however, as it would create new difficulties about whether or not genuine dispossession had been established.

But the story was not over. The Supreme Court referred the decision back to the Paris Court of Appeal which, on 27 February 2014,¹¹ took the unusual step of resisting the decision of the Supreme Court and upholding, once more, the Civil Law Pledge taken by the Bank. The rationale was, again, that there was nothing in L.527–1 of the Commercial Code, which created the Commercial Code Pledge, that specifically prohibited the use of the Civil Law Pledge and reliance was placed on the principle that “*silence and doubt benefit the general law*”.¹² A second reason given was that arguments by the Liquidator that a *pacte comissoire* was an abuse of process could not be supported when that very same *pacte comissoire* was a concept created by the French Civil Code.

THE DECISION OF THE ASSEMBLÉE PLENIÈRE OF THE SUPREMENT COURT

Accordingly, the matter was referred to a final, un-appealable body; an *assemblée plénière* of the Supreme Court.¹³ This assembly took place on 23 November 2015. The distinguished *avocat général*, Laurent Le Mesle, handed a detailed 15 page opinion to the *assemblée*, in which he noted the obscurity of the legislature's intentions on this specific point,¹⁴ but came down on the side of the lender. He recognised that the manner in which the Commercial Code Pledge had been conceived had led, after ten years, to more questions than certainties. On balance, he felt that contractual freedom should prevail, influenced also by the reality that a contrary decision would result in a number of pledges since 2006 being considered invalid.

In a highly unusual step, the *assemblée* did not follow the opinion of the *avocat général*. The Paris Court of Appeal was once again over-ruled, and the *assemblée* affirmed that the Commercial Code Pledge was the only technique available for financial institutions to take a pledge without dispossession over inventory. In contrast to the detailed opinion provided by the *avocat général*, the judgment was short on explanation. Reference was made, however, to the vital nature of stock for a company and the privileged position of a credit institution managing all of a company's accounts; such an institution could use its position to anticipate future difficulties. It was held that giving a credit institution the use of a *pacte comissoire*, (a process which comes with no judicial supervision)

¹⁰ Cour de cassation, civile, Chambre commerciale, 19 February 2013, 11–21.763.

¹¹ Cour d'Appel de Paris, 27 February 2014.

¹² “Le silence et le doute profitent au droit commun”, Cour d'Appel de Paris, 27 February 2014, RG no.13/03840, p 4.

¹³ The assembly consists of representatives of each chamber of the Supreme Court and meets just twice a year, meaning that only a few cases ever reach it. The fact that the case reached this assembly is a reflection of the debate created by the topic.

¹⁴ Supra [5] “In reality, it is doubtless difficult to identify precisely the draftsmen's intentions of a text which has been created by layers of additions corresponding to many objectives, themselves successive and sometimes contradictory” (opinion of the *avocat-général*).

could compromise the French “safeguarding procedures”¹⁵ for companies in financial difficulties.

COMMENTARY

This court saga has finally played out but, perhaps not surprisingly, in view of its prolonged history, there has proved to be one final twist to the story. These judicial developments, and the lending community’s displeasure with the decisions of the Supreme Court, have not gone unnoticed by the government. The so-called *Loi Macron* entered into French law on 6 August 2015. It was widely covered by the media because of the controversial labour-market reforms introduced by the French Economy Minister Emmanuel Macron, but for these purposes, the more pertinent pronouncement was an *ordonnance* issued under it on 29 January 2016 (the “2016 *Ordonnance*”).¹⁶ Applying to contracts entered into from 29 April 2016, the government has now amended article L.527–1 of the French Commercial Code, and provided that parties are now free to use either the Civil Law Pledge or the Commercial Law Pledge, at their own discretion. This pronouncement would have been regarded as nothing more than a clarification prior to the *Recovco* decision, and would appear to represent the legislature’s dissatisfaction with the judicial outcome in that case.

The decision of the Supreme Court in *Recovco* was perhaps not surprising in the light of the traditional French approach of viewing the survival of a company as the primary concern on insolvency. But the criticisms it has attracted are also not surprising: it was good news for the unsecured creditors in *Recovco*, who may make some unanticipated recovery, but it was a decision that did not follow commercial practice or embrace contractual freedom. Moreover, although banks have attracted strident criticism – particularly since 2008 – credit is the life blood of an economy, and this kind of judgment could have a negative impact on inward investment. For that reason, the 2016 *Ordonnance* has finally given much-desired comfort and clarity to lenders. The one open question relates to existing security taken by banks using the Civil Law Pledge. It remains to be seen whether French banks in particular will start to refresh existing pledges later in the year, or whether they will hope that any future challenges to their efficacy will be met by a recognition by the French courts of the wishes of the legislature.

The reluctance of the Paris Court of Appeal to uphold the position of the lender in this case is an anathema to most English lawyers. Taking a floating charge over a debtor’s assets is standard practice in English law secured lending transactions and also has the advantage of enabling the lender to appoint an administrator out of court on the debtor’s insolvency with a view to promoting the swift recovery of assets.¹⁷ The English law approach provides lenders with a degree of certainty that has been absent from the French system until the enactment of the 2016 *Ordonnance*. The pragmatic and flexible floating charge, taken for granted by lenders in a “creditor friendly” jurisdiction such as England is a creature of common law, and is rarely found in civil law jurisdictions. Any international finance lawyer, taking security in different jurisdictions around the world, will always need to search for local solutions.

JONATHAN WOOD*

¹⁵ *Procédure de sauvegarde*.

¹⁶ *Ordonnance* No.2016–56 du 29 January 2016.

¹⁷ Para 14 of Schedule B1 to the Insolvency Act 1986.

*Jonathan Wood, MA (Cantab) is senior legal counsel at Bank of London and The Middle East plc. He previously spent 8 years in Paris, France working as an in-house lawyer for a large French bank, with wide experience of taking security over local and international assets. Thanks to Paula Moffatt, Reader in Law, Nottingham Law School for her assistance in writing this case note.

BOOK REVIEWS

*Book reviews and books for reviewing should be sent to
the address given at the beginning of this issue*

A CRITIQUE OF CONVENTIONAL ECONOMICS

Phishing for Phools: The Economics of Manipulation and Deception

by GEORGE A. AKERLOF and ROBERT J. SHILLER

United States, Princeton University Press, 2015

1st edition, 288 pages, Hardback, £11.84, ISBN 0691168318

INTRODUCTION

This book by two American winners of the Nobel prize for economics is extremely accessible.¹ They are setting out a new way to understand that most central of modern institutions: the market. The subject matter is of inherent human interest, tales of disreputable deeds and those who opposed them; and of considerable political and intellectual interest. It is written in a clear and engaging manner, and avoids any use of algebraic expressions. The book is so well written for the non-professional reader that it almost invites dismissal as being slight and inconsequential. However, this would be to confuse the difficulty and obscurity of a text with its importance and profundity.

The modern age, global and capitalist and free market, is dominated by the story of the market: powerhouse of the great escape from poverty and insecurity described so convincingly by Angus Deaton.² The market celebrates human choice and rationality, giving power of decision to ordinary people, who are trusted to know what is best for themselves. It prefers to coordinate social action through voluntary agreements rather than State coercion. It harnesses the selfishness of economic actors to the satisfaction of the wants and needs of society through the price mechanism. It is a remarkable achievement, the modern market economy, and Akerlof and Shiller make the point several times that they are supporters of the market. However, they argue, all is not well in this artificial Eden.

CONTENT

The book begins, in the preface, by asking a very good question. If the market is such a good thing, and the United States of America is so rich and successful, then why is

¹ George A Akerlof (born 17 June 1940) is an economist and University Professor at the McCourt School of Public Policy and Georgetown University who won the 2001 Nobel Memorial Prize in Economic Sciences (shared with Michael Spence and Joseph E. Stiglitz). Robert J. Shiller (born 29 March 1946) is an economist, academic, and best-selling author who is currently a Sterling Professor of Economics at Yale University. Shiller is ranked among the 100 most influential economists of the world and he jointly received the Nobel Memorial Prize in Economic Sciences with Eugene Fama and Lars Peter Hansen in 2013 “for their empirical analysis of asset prices”.

² Angus Deaton, *The Great Escape: Health, Wealth, and the Origins of Inequality* (Princeton University Press 2013).

American life characterised by things no one would want? Why do so many people worry about making ends meet? Why are we subject to economic convulsions that undermine our economic security, such as the financial crisis of 2008? Why are so many Americans overweight or obese? Why is political life distorted by the power of lobbyists and political donors, whose influence seems to grow unstoppably? No one wants worry, insecurity, poor health, and loss of voice in their government. Yet these are clearly present day problems of American society.

Akerlof and Shiller build the argument that these ills are the unwanted consequences of the market, just as the market can produce great human goods, so can it also produce great human evils. In their introduction they set out the causes of market malfunctions, and argue that they are the very same forces that lead to the successes of markets.

Here is the first reason this is an important book. The authors discuss many familiar topics for instance, the cognitive biases that lead to “consumer irrationality” such as loss aversion; or overweighting of the present over the future; the availability heuristic; and others.³ The problems of self-control, or will, that generate inconsistency between considered desire and action; in evidence in extreme form in addictive behaviour, but familiar to almost everyone who has eaten too much sweet and luscious dessert at the expense of less appealing green vegetables.⁴ The problems of a lack of self-knowledge that lead us to prefer meretricious things that will leave us unsatisfied over our own true interests, which they liken to a ‘monkey on our shoulder’ influencing our choices.⁵ So far, so familiar, from the work of many scholars on behavioural economics. In fact, the three categories Akerlof and Shiller sketch out are similar to, although not identical to, the three categories used by Jolls, Sunstein and Thaler in their programme for “behavioural law and economics”.⁶ However, Akerlof and Shiller go beyond identifying “market failures” or anomalies, and argue that these features of the real world are as central to real markets as rational behaviour.⁷

The argument is simple and compelling. Market forces will lead to the exploitation of any opportunity to make excess profits (above the general rate of profit). Human frailty presents profit opportunities. Firms will develop products to take advantage of demand produced by cognitive bias, or a lack of self-control, or confusion about what is in the best interests of consumers. If we view the area not from the point of the buyer (the source of the economic “irrationality”) but from the point of view of the seller (who is acting in an economically “rational” manner) then ordinary market logic tells us that the sellers should shift resources, until they have fully exploited the market opportunity. An equilibrium will be produced when the frailty has been exploited to the point that any further exploitation will lead to returns below the average rate of profit. This is what Akerlof and Shiller term “phishing for phools”. The market response to the human condition.

³ See: Daniel Kahneman, *Thinking, fast and slow* (Allen Lane 2011), for an exceptionally well written work of social science for a non-professional audience, that discusses cognitive bias at length.

⁴ The foundational work in this area was carried out by Thomas C Schelling See: ‘The Intimate Contest for Self-Command’ and ‘Ethics, Law, and the Exercise of Self-Command’ in *Choices and Consequence: Perspectives of an errant economist* (Harvard University Press 1984).

⁵ The literature on self-knowledge, or its absence, is of course vast and goes back at least to Socrates. An interesting modern variation is the failure of organisations or countries to realise their own best interests, marking the problem not a failure of defective individuals but a feature of all human endeavour, see: Dani Rodrik, ‘When Ideas Trump Interests: Preferences, Worldviews, and Policy Innovations’ (2014) 28 *Journal of Economic Perspectives* 189.

⁶ Christine Jolls, Cass R Sunstein, and Richard Thaler, ‘A Behavioral Approach to Law and Economics’ (1998) 50 *Stanford Law Review* 1471.

⁷ A good account of the market failure hypotheses and its role in regulation is given in Harry McVea, ‘The Financial Services Authority: A Reassertion of the Market Failure Hypothesis?’ (2005) 64 *Cambridge Law Review* 413.

This makes phishing, the dubious and often disreputable exploitation of human frailty, as normal and central a feature of markets as the efficient production of goods and services that serve the true preferences (understood to be aligned with their interests) of consumers. This is no market failure, nor any pathology, nor the result of bad people taking illicit advantage. This is the natural result of a relatively efficient and competitive market, and failure to respond to the demands of phools is likely to lead to economic difficulty for firms. The price of rectitude might be insolvency. In the words of Akerlof and Shiller:⁸

“... competitive markets by their very nature spawn deception and trickery, as a result of the same profit motives that give us our prosperity”

Phishing is a central practice of the market. It is the use of persuasion (in the way the economists often use the term – not rational discourse but irrational influences) to make people choose to act not in their own interests but in the interests of the persuader.⁹ Once the initial ideas are introduced, the book begins to flesh them out through examples. The examples are intriguing and share with the reader, in a jaunty manner, the fruits of the wide and deep scholarship of the authors and their research assistants.

Part one (two chapters) is an attempt to demonstrate both the ubiquity of and scale of the problems caused by phishing equilibriums – markets that satisfy superficial wants at the expense of generating life impoverishing anxieties (chapter one); and markets that seem to satisfy wants, in an illusory manner, until the entire economy is destabilised (chapter two).

Chapter one is devoted to the anxiety about making ends meet that dominates the list of anxieties ordinary Americans feel, despite the fact that we all know the answer is to stick to a budget. The puzzle is why are so many people, like Macawber, spending more than they can afford, despite knowing better. The answer given is that many people are in business selling things we would be better off not buying, but that the salespeople know how to play to our weaknesses and to persuade us to buy: a phishing equilibrium.

The second chapter deals not with the suspect irrational consumer but with the epitome of rational and efficient markets: financial market investors.¹⁰ It is argued that the rewards available for reputation mining, a process similar to the abuse of trust, by people working in financial services made speculative activity more profitable than the provision of solid financial services that had built-up the reputations. The mortgage backed bond market produced an illusory risk free high return guaranteed by the reputations of the banks and credit ratings agencies. For so long as buyers were willing to take the product on trust, the profits to be made were enormous. Credulity made the buyers phools, and the financial industry phished them until the whole system was threatened by collapse: another phishing equilibrium.

Unsophisticated consumers or traders at the centre of the world financial markets, are both subject to phishing equilibria, the phenomenon is ubiquitous.

Part two, the bulk of the book, is a series of examples of phishing, and a final chapter on people who fought for ethical behaviour and against profitable but exploitative phishing equilibria. There seems little point in producing a series of less well-written

⁸ George A Akerlof and Robert J Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press 2015) 165.

⁹ Again a familiar theme, see: Vance Packard, *The Hidden Persuaders* (Ig Publishing 2007) and John Kenneth Galbraith, *The Affluent Society: Updated with a new introduction by the author* (Penguin 1999).

¹⁰ This is very familiar territory for the authors see: Robert J Shiller, *Irrational Exuberance* 3rd ed (Princeton University Press 2015); George A Akerlof and Robert J Shiller, *Animal Spirits: how human psychology drives the economy, and why it matters for global capitalism* (Princeton University Press 2010).

and informative thumb-nail sketches of the chapters. They deal with financial markets again, advertising and marketing, sales of houses and cars, credit cards, food and drugs, lobbying and politics, innovation, and addiction. They find phishing equilibria in all of these disparate areas of economic activities. The second reason this is an important book is developed over the course of part two, the idea that the stories people tell of themselves are central to their vulnerability to being phished. The authors make this express in part three, made up of a conclusion and afterword.

Our stories about ourselves are important to us, our identity is supported and justified by our ability to produce stories about ourselves.¹¹ Thus, making narratives of the self a central part of their account the authors open links across several disciplinary areas, although they do not pursue them. What they do is identify the manner in which the story we are telling ourselves, or we are letting someone tell us about ourselves, makes some things salient and easy to attend to, and other things obscure and hard to perceive. Narratives bring with them a focus of attention and concern that can be exploited, they can function as a source of distraction for a phisher.

Phishers do not need to wait for phools to appear. Phools can be facilitated. Perhaps the clearest example of the rational devoted to creating the irrational is one not fully explored by Akerlof and Shiller. They refer to gambling addiction, but develop only an account of tobacco and alcohol in their chapter on addiction. However, Natasha Schull explores the gambling industry and specifically the slot machine.¹² She describes the application of science and technology in the production of ever more stupefying machine experiences, that produce and sustain addiction. The design of the machines is informed by customer feedback, and is responsive to what the customer wants. But the instrumental rationality serves the maximisation of the income stream, and that is fed by addicted gamblers, and what addicts want is a more satisfying reinforcement of their addiction. In a turn that approaches the ironic, the industry tells the customers that they serve their needs, and that it wants to reduce “problem gambling” whilst it devotes massive resources to improving the gaming experience that addicts identify as the central experiential aspect of addiction, the creation of a more satisfying machine zone. So, the industry tells to gamblers and society, a story about rational people who choose to play; the gamblers start off identifying with this story, but may start telling themselves another story, based in the practice of gamblers anonymous; the industry tells a story of how it supports efforts to cure problem gambling, while developing more effective machines. This particular human frailty is not naturally occurring, and requires nourishment and care before the phishing can commence. The stories people tell about themselves – that machine play is harmless fun – can be manipulated by those whose stories are told to persuade people to act in the best interests of the story teller. This is an inherent and characteristic quality of humanity turned to the task of phishing.

Akerlof and Shiller express the importance of this idea of narrative, or stories we tell of ourselves as a new variable, one not identified by the more fragmented accounts from behavioural economics:

“It also brings into economics a new variable. That variable is the story that people are telling themselves. Furthermore, it makes natural the idea that people make decisions that can be quite far from maximising their own welfare, and that these stories are quite manipulable. Just change people’s focus and one can change the decisions they make.”

¹¹ See: Charlotte Linde, *Life Stories: The creation of coherence* (Oxford University Press 1993); Anthony G Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press 2002); A R Luria, *The Man with a Shattered World: the history of a brain wound*, Lynn Solotaroff tr (Harvard University Press 1987).

¹² Natasha Dow Schull, *Addiction by Design: Machine gambling in Las Vegas* (Princeton University Press 2014).

Phishers are story tellers, quintessentially human, but their stories are instrumental not expressive. One story being told in contemporary discourse is that markets are good, and Governments are bad. This story too is a phish. Markets can produce great human goods, but also great evils, and they will produce both: the invisible hand has no ethical conscience, for it is not God but the price system. The central themes of this book are in harmony: phishing is normal and ubiquitous because it is founded upon the human propensity for making sense of the world through stories.

CONCLUDING REMARKS

I am not sure if the book manages to forge a robust new synthesis. However, it represents a serious attempt. It moves the discourse forward by insisting that phishing is not peripheral to markets but a normal feature. Akerlof and Shiller develop an analogy between phishing and cancer.¹³ Like cancer phishing is not an infection, the result of some external interference with the market, it is an internal malady, a non-adaptive form of normal life forces. Phishing cannot be addressed by policy until it is recognised as a normal excrescence of the market. Phishing relies upon and is supported by the same market forces that have enabled so many people to make the great escape from poverty and existential insecurity. The authors do not offer new data, but they do offer a new story we can tell ourselves about the market, one that makes its vices apparent. Hopefully, if we can see the problem, with our new focus of attention on phishing as inherent in markets, we can respond to it intelligently in public policy.

To conclude Akerlof and Shiller:¹⁴ “. . . intend *Phishing for Phools* to be a very serious book. But we also intend it to be fun.” They succeed in both these aims. This short book is an ambitious re-casting of much that has been most promising in economics over the past three decades, it addresses the need to delimit the market in a powerful and novel manner. It is also an informative and enjoyable reading experience.

GRAHAM FERRIS
READER IN LAW
NOTTINGHAM LAW SCHOOL

¹³ George A Akerlof and Robert J Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press 2015) 165–166, they base their account of cancer on Siddhartha Mukherjee, *The Emperor of All Maladies: A biography of cancer* (Fourth Estate 2011).

¹⁴ George A Akerlof and Robert J Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press 2015) 11.

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**“NOT ONLY MUST JUSTICE BE DONE; IT MUST ALSO BE SEEN TO
BE DONE.”**

**R V SUSSEX JUSTICES, EX PARTE MCCARTHY ([1924] 1 KB 256,
[1923] ALL ER REP 233)
SHOULD THERE BE CAMERAS IN COURT?**

*THOMAS GOODMAN**

INTRODUCTION

At the London 2012 Olympics, Oscar Pistorius found himself staring down a camera lens at millions of spectators during the 4 × 400m final. Less than two years later, he was staring down a camera in an entirely different situation – as a defendant in a murder trial. Following the decision by the High Court of Pretoria that the trial of Pistorius was to be shown live on television, it is necessary to examine the implications of this type of broadcast on the UK’s legal system. This article will investigate the use of cameras in courts from both a legal and social perspective, and also consider the repercussions of following in the footsteps of jurisdictions like South Africa and the US by broadcasting trials live on television. It will be argued that whilst there are logical arguments for the use of cameras in court, including a more transparent judiciary, such arguments do not match the true motivations of televising hearings and would ultimately lead to the conversion of trials into entertainment spectacles, which could potentially affect the impartiality of the courts.

The Case For Cameras In Courts

Since the passing of the Criminal Justice Act 1925, which prohibited the taking of photographs in court, developments in both technology and the law related to it have been significant. Following the Crime and Courts Act 2013, television cameras were permitted into the Courts of England and Wales in cases such as that of Kevin Fisher, who was appealing against a sentence for his role in a plot to counterfeit pound coins. Despite these advancements, UK television schedules have yet to see the kind of cases like those witnessed in South Africa with Pistorius, or in the US with American football star O.J. Simpson.

This begs the question, why have the UK Courts been seemingly left behind by other jurisdictions? To answer this, the purpose behind televising court trials must first be ascertained. The statement of Lush J.J. that “justice should manifestly and undoubtedly be seen to be done”¹ was made in the context of a country without widespread television broadcasts, mobile phones or social media. However, it still has relevance today. One of the principal reasons put forward for using cameras in courts is that it gives the UK public

*Student of Law with Spanish and Spanish Law (BA Hons) at the University of Nottingham.

¹ *R v Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256, 259.

greater access to its legal system, in order to increase confidence in the judiciary. This concept was advocated by Lord Neuberger in his report to the Judicial Studies Board in 2011.² He argued that the public scrutiny of court proceedings is essential in preserving the rule of law, in that it allows “transparency and engagement” in UK courts.³ Many examples can be offered where such a demand for transparency would have existed in the UK, such as during the trials of the MP’s who misused their parliamentary expenses in 2009, or during the hearings of those involved with the News International phone-hacking scandal in 2011. In a report by the Department of Constitutional Affairs it was highlighted that a further motivation for those who support the televising of trials was the idea of “open justice”.⁴ Respondee were influenced by a belief that they had experienced an injustice within the court system which may have been exposed had their trials been televised.⁵ Clearly, public scrutiny of courts is necessary in the functioning of an impartial legal system and, therefore, the permission of cameras into courts to some extent should be permitted. For example, it is understandable that the general public should be able to see courtrooms and some of the processes that take place during hearings. Nonetheless, questions arise as to the extent of this access and particularly whether the live broadcasting of trials would take open justice beyond a level that would benefit the judicial system.

To What Extent Should Cameras Be Permitted?

It has been put forward that showing trials on television is not all that different from broadcasting parliamentary business.⁶ However, returning to the rule of law principles, it is clear that Parliament is supposed to represent the public and, therefore, it is logical that the public have increased access to its proceedings. In contrast, the courts are required to act independently of public opinion. Consequently, there is much to be said for there being different level of public accessibility within the two institutions. Lord Neuberger himself declared that whilst there are arguments for broadcasting hearings, proper safeguards must be introduced in order to prevent the undermining of the administration of justice.⁷

A central concern behind televising trials is the potential ‘Hollywoodisation’ of proceedings and their transformation into television programmes purely for the purpose of entertainment. This was outlined by Donald Finlay QC in relation to Holyrood’s Justice Committee, which investigated the involvement of the media in Scottish criminal trials in 2012.⁸ This potential conversion of trials into prime-time television programmes runs the risk of trivialising legal decisions, as demonstrated by Paddy Power, who initially aimed to profit from the trial of Pistorius by taking bets on the result. Furthermore, this problem is not exclusive to celebrities like Pistorius, but extends to ordinary members of the public, such as Steven Avery. The *Making a Murder* documentary series (2015), concerning the conviction and exoneration of Avery for sexual assault and attempted murder in the US, received critical acclaim for its entertainment value. However, it has been criticised for presenting “skewed” information on the trial and excluding certain

² Lord Neuberger, ‘Open Justice Unbound?’, *Judicial Studies Board Annual Lecture 2011* (16 March 2011).

³ *Ibid.* 10.

⁴ Department of Constitutional Affairs, ‘Broadcasting Courts: Response to consultation carried out by the Department for Constitutional Affairs’ (CP(R) 28/04/30 June 2005) para 3.

⁵ *Ibid.*

⁶ ‘Donald Findlay QC Voices concerns over cameras in court’ (*BBC News*, 2 October 2012) <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19791828>> accessed 15 February 2016.

⁷ Lord Neuberger (n 2) 14.

⁸ (n 6).

evidence against Avery.⁹ Dean Strang, one of Avery's defence attorneys, defended the programme's editing by explaining that "no one's going to watch a 600-hour movie of gavel-to-gavel, unedited coverage of a trial".¹⁰ However, it is apparent that this editing has led some to believe that the programme was biased towards Avery. If this selective editing were to occur during a live trial, it would not provide transparency, but would leave the public with an inaccurate understanding of the case in question.

Consequently, the real reason behind public interest in these trials must be considered. It is disputable that in the Simpson and Pistorius cases, the real cause of such great societal involvement was not in fact a desire to ensure the functionality and neutrality of the judicial system, but a cultural fascination with celebrity gossip. Today's society is enthralled by reality television, and whilst there may be members of the public who would enjoy court broadcasts out of genuine interest, a large proportion of viewers are as likely to be as interested in the judicial system as they are paint drying. The demand, as Strang highlights, is not for an ongoing discussion of the points of law, but for the vital question by the prosecution, the crucial piece of evidence and the "you can't handle the truth" moments. Those broadcasting the trials, judged by their viewing figures, would be wary of this, resulting in selective editing to make the hearings more exciting. If it were possible to tune into the ongoing criminal trial of professional footballer Adam Johnson, how long would it be before there is a Match of the Day-style analysis of his 'performance' on the television? If this were to result in a skewed representation of the hearing, stricter limits would have to be put into place. It is likely that those who are genuinely interested in seeing a transparent legal system are able to satisfy themselves with the current level of transparency available, which includes extensive media reports and live tweets from the courtroom.

Equally, in particular reference to criminal trials, the pressure on witnesses where cameras are present could greatly affect their testimonies, or perhaps even deter them from wanting to give evidence at all. Following a test of recorded trials in 2004, Lord Falconer (Lord Chancellor at the time) identified that the principal reason given by the 55% of respondents in opposition to televised trials was that it would have a negative impact on witnesses who were taking part in proceedings which they may already regard as emotionally challenging.¹¹ In the Pistorius trial, witnesses were not actually recorded, but it is still evident that a courtroom full of cameras is likely to make the situation all the more nerve-wracking. Alternatively, others may be motivated by a desire to achieve quasi-celebrity status during their broadcasted testimonies, through exaggerating their role in the facts of the case. Furthermore, it is not just pressure on witnesses that must be reviewed, as defendants may also find themselves under far greater public scrutiny. Rebecca Davis, a reporter for the Daily Maverick in South Africa, has highlighted how there are very few convicted murderers that received as much negative coverage as Oscar Pistorius did during his trial.¹² Clearly, the publicity of his trial would have accentuated the stressfulness of the situation.

Arguably, even lawyers and judges would be under increased pressure to argue or find a publically desirable outcome, especially where public opinion is largely swayed towards a favourite. During the Simpson trial, Judge Lance Ito became the subject of a

⁹ Mahita Gajanan, 'Making a Murderer' (*The Guardian*, 5 January 2016). <<http://www.theguardian.com/tv-and-radio/2016/jan/05/making-a-murderer-juror-steven-avery-framed-netflix>> Accessed 19 February 2016.

¹⁰ *Ibid.*

¹¹ (n 6).

¹² Clive Anderson, 'The case for televised trials' (*The Financial Times*, 28 February 2014) <<http://www.ft.com/cms/s/2/4445419e-9ee5-11e3-a48e-00144feab7de.html#axzz2upomyolW>> accessed 16 February 2016.

great deal of public criticism, even on American chat shows.¹³ Where there is so much at stake, it could be difficult to maintain impartiality in proceedings. It is true that so far the daily reports of trials, including live tweets from journalists during hearings, have been unable to affect the impartiality of the UK judicial system. However, it is arguable that there is a significant difference between reading extracts from a trial in a newspaper and flicking through television channels to find a live murder trial during prime-time viewing.

It is worth referring back to Lord Neuberger's comments on public scrutiny being essential to the rule of law. As discussed, it is undeniable that a court system closed-off from the public would not be in keeping with this indispensable principle. Be that as it may, at some stage a line must be drawn. Where the public are able to access proceedings in so far as they are able to influence them, this threatens the impartiality of the judiciary, and a rule of law is no longer present.

CONCLUSION

To summarise, whilst the reasons behind permitting cameras into courts may be logical, the real motivations and the potential consequences of doing so are questionable. Considering the level of transparency that is already present, it seems unnecessary to take the risk of placing the representation of judicial proceedings in the hands of editors who are judged on the standard of entertainment that they provide and the number of viewers that they obtain. This "Hollywoodisation" has already resulted in the association of certain hearings with entertainment industries such as gambling, which have no place in the judicial sphere. More severely, the resulting increase in the intensity of media presence could create undue pressure on witnesses, judges, defendants and juries, all of which could affect the impartiality of trials. As a result, if cameras were to be permitted into courts, the fine line between what is justice and what is entertainment would have to be borne in mind, as the two are not always compatible.

¹³ *Ibid.*

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Burton Street
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