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The headscarf controversy – a response to Jill Marshall

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I confess to having a great deal of trouble writing this response, not least because it has illuminated some of my own misunderstandings and prejudices. Many of my instinctive responses to the debate that Jill Marshall so eloquently outlines are, it would seem, unhelpful. To begin with, I am antipathetic towards religion. This does not bode well for the task at hand – a nuanced engagement with the difficult subject of law's place in regulating religious expression, the recent treatment of which has caused hurt, offence and anger on both sides of the debate. My own upbringing was profoundly influenced by Christian ideals. Indeed from the age of 15 to 17 I taught 'Sunday School' at my local branch of the Church of Scotland. But when I eventually realised that I simply enjoyed singing songs with playful and happy 6 year olds, and that my brain engaged with the bible as a *story* about a rather nice if enigmatic man, I gave it up.

Since then, having become a politically aware and specifically feminist student and academic, I have had some difficulty in accepting the benefits of any institutionalised form of religion. In particular it seems that as a matter of historical record, many if not most religions have at one time or another systematically discriminated against, persecuted, isolated, controlled and/or impoverished women and other marginalised communities, including gays and lesbians, privileging the lives and views of the powerful over the powerless. Of course, this is not to say that all social problems result from religion; rather it seems that religion has frequently provided the backdrop, motivation and the means of carrying out deeply troubling practices including the exacerbation of poverty and other inequalities, colonisation, war, and even genocide.

I recount this rather visceral reaction to the matter of religion in order to personally and politically situate my response to Jill Marshall. My internal tirade does nothing to answer the question of what, if anything, the law or the state should do about headscarfs. But it highlights my belief in the dangers of protecting an uncurtailed right to practice religious freedom, particularly where the exercise of that freedom involves in some way, a 'harm' against an already vulnerable or marginalised community. Of course the precise meaning

of the words ‘harm’, ‘vulnerable’ and ‘marginalised’ will be contested. An obvious example at the extreme end of a spectrum of harms would be the (non-therapeutic) genital cutting of girls (sometimes referred to as female genital mutilation), who have no opportunity to meaningfully understand or choose the procedure (and its aftermath) for themselves. Here (and I know Jill Marshall would agree), the fundamental lack of autonomy and invasion of bodily integrity makes such a procedure deeply harmful. The choice of Muslim women to wear a headscarf presents a far less obvious and tangible ‘harm’; despite the recent decisions of the ECtHR, it is far more difficult to demonstrate a static, monolithic reading of the wearing of a headscarf for the purposes of applying Article 9 of the European Convention on Human Rights, than it is to argue that genital cutting of contravenes Article 2, 3 or 8 rights (although even here debate exists about whether, with an inevitably Western colonial lens, we can uncomplicatedly perceive this to be a ‘harm’).¹ In any case, I believe that these kinds of more obviously harmful practices should at least put us on notice that the right protecting freedom of religion, as set out in Article 9, is never a right that can be protected without close scrutiny of the reasons for, and the meaning and impact of, the activity in question.

It is at least partly for these sorts of reasons that Article 9 is a limited rather than an absolute right. As I already suggested, I am antipathetic towards religion. But I do not think that people should be persecuted for their religious beliefs - or any other - beliefs. However, saying for example that a Jewish person should not be persecuted on the basis of their faith, and maintaining that the state has a positive obligation to protect that person’s right to express their beliefs and practice their religion, does not mean, in my view, that I cannot ask why they think it necessary to remove a portion of young boy’s penis. The right to carry out this religious practice, I think, should be open to political and legal discussion of related issues, such as: the gender politics of such a practice; human rights of autonomy and bodily integrity; the criminal law; health implications; and medical ethics, to name but a few. In the same way, the question of headscarfs – the

¹ Diana Tietjens Meyers (2000) explores the relationship between culture, autonomy and agency in relation to female genital cutting. One possible worry here is the legal privileging of religious claims over cultural claims, which may lead to ‘cultural’ practices being represented by applicants as ‘religious’ practices in order to gain legal protection. FGC cannot be reduced to one or other category and is not always (indeed rarely) simply a religious practice but is also linked to cultural traditions, nationality, and sex/gender politics. Thus the ‘corrective’ surgery performed on intersex infants in Western society is also brought into question by this debate. See Tietjens Meyers (2000); Grabham (2007); Fausto Sterling (2000).

meaning and impact of asking women (not men) to wear headscarfs – should be open to political and legal challenge. It cannot be true to say that religious practices on the one hand and law (and politics) on the other are entirely separate spheres of human activity. Hence to argue that religion is a deeply political issue – in the sense that it cannot be abstracted from the socio-political context within which it both creates and is created by relationships of power – is to open up religious practices to political challenge, which may in turn involve the question of legal scrutiny and/or intervention.²

As Marshall points out, the court in *Sabin* examines the potential negative impact an individual decision to wear a headscarf might have on those who have chosen not to wear the scarf, in that it might denote gender inequality, and this reasoning is one strand of the court's decision to limit the applicant's Article 9 right to freely meet their religious obligations by wearing the headscarf. Marshall expresses concern about these judicial limits placed upon Article 9 (p5). She turns to Article 8 as a more appropriate vehicle for the protection of contemporary expressions of religious freedom, especially given the rich and varied discussion, fleshing out the parameters of Article 8, which has emerged from the ECtHR's decisions in recent years. While the court's grounds for restricting the application of Article 9 in *Sabin* may be questioned, Article 9 needs to be a limited right, for the reasons stated above. Moreover, Article 8 is also a limited right which is subject to the same sorts of restrictions. In the context of a debate about religion where the court seems preoccupied with the impact the wearing of the scarf has on the non-scarf wearing population, it seems likely that in balancing the individual right against the rights and freedoms of others, the court may well apply the same sorts of justifications for rejecting an Article 8 claim as they have done in rejecting Article 9 claims.

In any case, I am not convinced that Article 8, as applied to the protection a person's right to wear a headscarf, is necessarily the appropriate locus for thrashing out arguments about the right to protection of religious freedom. For one thing, an Article 8 right is embedded within modernistic liberal notions of the individual, autonomous self. Marshall describes a process of acknowledgement by the European Court whereby the autonomous chooser envisaged by Article 8 should be interpreted not as an atomistic

² I hope of course that such political discussion would be fair, open and deliberative, and that the potential 'tyranny of the majority' would not prevent proper protection of the rights of the minority. In this sense, legal debates about the proper scope of religious freedom are always also political questions.

person but as a human being in a network of relations with others. She argues that the right to private life now encompasses the “right to develop one’s personality in connection with others” (Marshall p7). But without knowing more about what this means, there is still some room for scepticism about the expansiveness of Article 8. The notion that there is a process of choosing who and how to be “through a social context” (Marshall p7) is rather vague. Moreover the Article 8 cases Marshall refers to here are not cases about religious expression, but mostly pertain to sex/gender identity or the right to decision-making about one’s own healthcare. It is therefore difficult to see how this relational aspect to Article 8 will play out in a religious context.

In addition, in this reinterpretation of Article 8 as more relational, it seems that the focus is still on *choices* made by an already pre-existing autonomous subject, in relation to others, rather than that the ways in which *individuals* are made through socially contextual choices. Marshall does not explicitly refer to such a pre-existing subject. However, her trust in and reliance upon Article 8 as the foundation for protection of autonomy and religious freedom tend towards the (liberal) notion that we, as existing autonomous subjects who have a core identity, *develop* (or perhaps even *choose*) our identities and personalities through interrelation with others (Marshall p6-8). This does not take into account the view that we, as sexed/gendered, raced, and classed subjects, *come into being* and are enabled/constrained by legal and political (and therefore religious) discourses as well as our relations with others.³ This may seem like a semantic distinction, and one that has no real bearing upon the practical question of legal rights to freedom of expression. However it seems important to note that a woman’s choice to wear the headscarf is not simply an act of the liberal choosing self, through selection of identity fragments from an array of pre-existing possibilities. The very range and nature of existing choices open to the individual form part of the process in which a person comes to understand themselves (and be understood by others), and will also impact upon the individual’s conception of what counts as a choice, and what it means to make a choice.

In other words, the wearing of a headscarf has meaning beyond the choice of the individual; it is deeply connected to the belief system of a larger community, which is produced by - and produces - religious subjects. In that sense religion and its expression is not just a personal matter but has significance in large part because of its place in a

³ See for example Foucault (1984)..

broader (political as well as religious) tradition, and an established (though not static) framework of norms, beliefs and practices. It is never simply an individual choice. The wearing of a headscarf would have a very different significance were it not connected to a belief system beyond the self. It is part of individual identity to be sure (Marshall p9), but only because it is part of a religion, which is not solely an individual matter. Religion is based on group rules, expectations and norms; individual adherence to a set of beliefs evokes the memory, history and continuing evolution of religious and cultural practices of the many. Like culture, religion is not (per)formed and developed by one individual, or by individuals in isolation from each other, but by the interactions and lived interwoven experiences of individuals and groups. Correspondingly, these individuals are produced by and make sense of themselves through religious (as well as other) discourses. Reducing the decision to wear a headscarf to an autonomous, free, individualistic *preference* confines a complicated and multilayered combination of symbolic and practical meanings within the narrow and impoverished framework of the liberal choosing self - a framework much criticised by feminists and others as being racialised, gendered and heteronormative (amongst other things).⁴

Even if we accept that individuals choose relationally, if we individualise either the action of wearing a headscarf, or the choice to practice a particular religion we underestimate the extent and power of the social, political and cultural context in which the actions and choices take place, thereby also reducing our opportunities to politically engage with and problematise particular practices. Article 9 recognises the fact that religion is more than the sum of the actions of atomistic individuals. It has the potential to open up space for us to put a specific belief or practice in the context of the wider framework of the faith in question, and therefore allows us to judge more easily and more contextually, whether or not the justifications for the practice have merit. Even if Article 8 could be interpreted as allowing people to live according to their own lights in accordance with wider religious and cultural beliefs, arguably Article 9, more easily than Article 8, enables us to see the historical, cultural and political context as well as impact of the practice, and how it relates to other connected tenets and principles of the faith. Thus we are able to challenge a religious practice that may seem discriminatory, within a context that both allows a faith to explain and justify the practice, as well as facilitating a conversation

⁴ See for example Hunter and Cowan (eds) (2007).

about trends and connected practices within a faith that give contextual meaning to the singular instance of a specific practice.

Engaging in this kind of analysis would also allow the court to consider that, again like culture, religion is contested, fluid and shifting in meaning, rather than concrete, fixed only open to one monolithic reading. This is more in tune with people's lived experiences of religion and the ways in which beliefs and practices are not stable but can vary in strength, significance and interpretation across a person's lifetime. One difficulty then with using Article 8 is that individual expressions of autonomy and choice tend to be captured, categorised and concretised in order that law makes sense of the right in question. Maneesha Deckha suggests that a woman wearing a headscarf can assert that this forms a part of her right to a cultural identity, and that this is often an important legal and political claim to equality (and, presumably, autonomy).⁵ But such a move, it seems to me, may not move beyond the dangers of reification of a practice,⁶ and would still rely upon an expansive reading of Article 8. Courts may be unwilling to engage in such expansive interpretations of Article 8, or to treat autonomy as a rich, or 'thick' concept in these sorts of cases, especially if there is a perception that cultural claims are made in order to avoid the problems that have arisen in assessing the proper scope of rights of religious expression. While it is unclear the extent to which religion and culture can be separated, neither should we conflate the two; it may be worthwhile exploring the ways in which cultural traditions and religion overlap and intersect in these cases to strengthen human rights claims.⁷ It would certainly be fruitful to reflect on the ways in which culture and religion are analogous, and how they might be different, especially in several key areas such as choice, relationships with others, identity and difference.

One obvious problematic in the legal and political discourse on this subject, as Marshall acknowledges, then, is the question of choice, and what it means to "flourish in tune with the identity one chooses for oneself" (p8). The debate about women's choices to wear the headscarf tends to be polarised: on the one hand there are those who believe that a woman can make autonomous choices, both about whether or not to wear the headscarf, and what the headscarf means to her; on the other, many express the view that the headscarf is so infused with deeper meaning – i.e. gender inequality – and that it is

⁵ Deckha (2004).

⁶ See Deckha, *ibid*, arguing that this 'essentialising' move is not necessarily problematic.

⁷ See note 1, above.

impossible for an individual person to make those kinds of choices in a vacuum, abstracted from the associated and tenacious gendered foundations of the practice.

Neither of these apparently mutually exclusive positions is helpful in this kind of debate since, essentially, both to some extent are true – many do make a choice to wear the headscarf, while others are literally or implicitly forced. Indeed, it is true even to say that choice and constraint are both true simultaneously; although individuals can reinterpret and reformulate cultural practices, it would seem to be impossible to completely detach a practice from its broader historically and culturally specific (and often coercive) contexts, or what Judith Butler (1993: 225) would call its ‘citational legacy’. Take marriage, for example. A same-sex couple in Canada who decide to get married are clearly reinterpreting this ancient patriarchal, heteronormative institution for their own ends.⁸ However this does not completely undermine the historical elements of marriage that continue to trouble critical activists and scholars; despite the advent of gay marriage, (Judaic-Christian Western) society still privileges a notion of marriage that centres monogamy, conjugality, a dual (rather than multiple) system of partnership, and is founded on the assumption that these kinds of partnerships provide the only responsible spaces in which to form families and nurture children.⁹ Therefore the choice to participate in same-sex marriage, while in a sense refashioning the historically exclusive institution, cannot be read as a fundamental challenge to the key concepts of marriage, and cannot be completely abstracted from the social context in which our legal and political institutions continue to place a very restrictive notion of the proper partnership unit at the centre of our lives.

The choice to wear the headscarf is comparable. Here the claim is not, then, that individual women may think they are making choices but are instead suffering from false consciousness, but rather that these individual choices cannot be read simply as expressions of autonomy without also taking into account the citational legacy of these acts - that such choices may also call up other meanings (both symbolically and practically), including restrictive notions of what it means to be a ‘good’ woman. In that sense we must always appreciate the broader meanings associated with the wearing of the headscarf.

⁸ I have chosen Canada for my example because it is one of the few jurisdictions in the world where same sex marriage (as opposed to civil partnership) is legal.

⁹ See for example, Auchmuty (2007); Calder (2007); Barker, (2006); Kaufman (2005).

The context in which choices are made are also significant; choices depend, for example, to a large extent on the geographical and cultural context within which one is born and raised – and religion is a good example of this. While clearly some people convert from the religion in which they are raised, knowledge of alternatives is required, and for some this is simply not available. In answering a different question, one about the ‘true’ nature of sexuality, Lisa Duggan has suggested that sexuality and religion are analogous in that, like sexual desire, religion is “not natural, fixed, or ahistorical, yet not trivial or shallow, as the term “lifestyle choice” implies... people can and do convert. But it is also understood as a deep commitment... highly resistant to coerced conversion, and deserving of expression and political protection”.¹⁰ Faith and the practice of religion, like sexuality, is neither innate or a voluntary act of will. Hence, the commitment to religious belief or the expression of a religious practice can be reduced to neither an individual choice, nor a coerced or indoctrinated form of commitment – even while it can be either of these things for particular individuals. So what does it mean to wear the headscarf?

At a general level, Lyon and Spini (2004) rightly point out that the fact that this question about the meaning of the headscarf is taking place in a more general climate of fear, hatred and incomprehension – in their phrase xenophobia – about Islam, proscribes that the headscarf takes on a particular significance; crucially it is the (control over) bodies of women that have become the focus in this spectacle. Alongside the controversial ‘veiling’, or covering of women has come a high degree of concentrated scrutiny upon the (in)visibility of women’s bodies, and in turn, an eroticisation, even a fetishisation of the figure of the exotic, unknown (unknowable) female Other as a means of controlling terrorism, extremism, immigration, and fear of the unfamiliar and foreign.¹¹

More particularly, Lyon and Spini emphasise that in the cases brought before the ECtHR, there has been very little considered investigation of what the covering of the hair, and sometimes face, actually means for Muslim women. There are undoubtedly different readings of what the headscarf means in Islamic religious practice. Some

¹⁰ Duggan (1995a), p6-7. Duggan suggests that sexuality is paradoxically both “malleable... and yet highly resistant to coercive change... This is a paradox that neither notions of identity nor fluidity can quite capture”(1995b: 192). Arguably sexuality and religious faith/practice are analogous.

¹¹ For discussion see Scott (2007), particularly chapters 2 and 5.

Muslims believe that a woman should cover her head at all times, others do not. It seems that for those who are required to wear the headscarf, the obligation is rooted in the idea that pure and responsible women are only permitted to be unveiled in private when in the company of family, and not in public spaces. It is shameful for a woman to be 'uncovered' in front of men who are not family, and the headscarf is a form of protection of her sexuality from men (as well as a form of protection of the reputation of the family of that woman). In this version, in the sense that women are made to bear the weight of responsibility both for their own sexual safety, and for the potential sexual responses of men, the headscarf can be read as a symbol of oppression.

For others who choose to wear the headscarf, it may have quite a different meaning. It could be, as Lyon and Spini have suggested, a marker of womanhood, rather than a symbol of domination and oppression. They describe a group of women Islamic scholars who are re-reading the key Islamic texts and redrawing the boundaries around properly religious obligations, and those obligations imposed by a historically patriarchal religion in order to control women in the name of religion. These women celebrate the differences between men and women, where differences are perceived to be biological rather than social and political, where women are seen as complementary to men, and - despite sex segregation - have access to the same social and political opportunities as men. Alternatively, women may have chosen to wear the headscarf as a response to and reaction against the exercise of colonial power which prohibited uncivilised and non-Western displays of traditional customs such as the hijab. For these women the headscarf is a symbol of political resistance to Westernised ideals of women/person-hood; the reclaiming and politicisation of arguably the most visible Islamic representation of female difference.¹² For yet other women, the headscarf could be chosen as an even more radical response to the Islamic tradition of hijab. Here Lyon and Spini reflect on the manifestation of the 'new veil' whereby women are deciding to remain covered at all times, in public and private, in order to both question the artificiality of that distinction and also challenge the model of patriarchal power that decides when and where the headscarf is to be worn. Clearly then there are many nuanced layers to the possible significance of the decision to wear the headscarf, which do not appear to be thoroughly explored by the courts within the cases that have come before the ECtHR.

¹² See Scott, *ibid*, chapter 2.

So, what does law have to do with all of this? Ultimately, my instinct is that in fact law has very little role to perform here, at least in relation to ‘regulating’ the headscarf. The law has no place preventing women from wearing the headscarf. Gender equality as a goal cannot be put to work as an overarching rationalisation for banning the wearing of a particular religious symbol since it is not true to say that all those who wear the headscarf are either oppressed or coerced, or even unequal in a substantive sense. Even if it could be shown that the choices of some women to wear the scarf had an impact on some of those who do not (and this is far from clear), it could also be argued that the choices of those who do not wear the headscarf, including western non-Muslim women, have a negative effect upon the lives of those who *are* subject to coercive religious regimes because it reignites anti-Western reactive political and religious zeal (though this again is immeasurable). Regrettably both arguments only serve to entrench the distinction between ‘good’ and ‘bad’ Muslim girls/women. Indeed as Marshall suggests, the ban itself might have all sorts of detrimental effects on those women who are already most vulnerable (p11). But, even if, suspending disbelief, there was consensus that wearing the headscarf was a sufficiently bad thing all round, because it represents gender inequality and oppression, and that this is harmful to individual (and/or communities of women), the way to stop women wearing the headscarf is not by way of a legal prohibition – the law is far too blunt an instrument to achieve these ends. Some practices cannot, in reality, be prevented or regulated by law. In other words, law is often not the answer to socio-political disagreement.

Ultimately however I do not think it is true to say that it is never the court’s place to make an appraisal of a religion or religious practice (cf *Sabin*, dissenting judge, see Marshall p5). If a religious practice were threatening the life of an individual or vulnerable group, one might hope that the court would be willing to state that such a practice contravened, for example, a person’s Article 2, 3 and/or Article 8 rights. To this extent there will always be a place for law in examining the appropriate role of religion in our lives, and in helping to develop criteria for a concept of ‘harm’. In relation to the headscarf, though, it seems that law’s instrumentalisation of the important goal of gender equality (whatever we might think that means) is wrong-footed. Using law here seems to foreclose rather than open up discussion of some of the most fundamental issues at stake, including the question as what counts as ‘harm’. Legal regulation of the headscarf should be replaced with robust and real political debate about the many diverse and

intersecting ways in which it is possible to experience womanhood, sexuality, culture, religion, race, nationality and economic security in the 21st century. And here I am in agreement with Jill Marshall that a constraint in the form of a ban can never, in this context, be the solution.

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