The Place of the Niqab in the Courtroom

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Abstract: This paper analyzes the Supreme Court of Canada's decision in *R v NS,* 2012 SCC 72 where the Court considered if a witness who wears a niqab for religious reasons can be required to remove it while testifying. The Court identified the two Charter rights engaged: the witness' freedom of religion and the accused's fair trial rights, including the right to make full answer and defense. This paper focuses on those aspects of the Supreme Court's decision that relate to religious freedom, multiculturalism and reasonable accommodation. Analyzing the Court's reasoning through the lens of critical multiculturalism, I consider the potential of the reasonable accommodation framework to forward minority rights. I suggest that had the Supreme Court applied an intersectional framework to adjudicating NS's claim, it could have crafted a more contextual response based on her location along multiple axes of discrimination: gender, religion and racialised minority. This paper aims to contribute to a better understanding of mediating individual and group tensions, to move towards a more inclusive notion of citizenship than can foster a commitment to a shared multicultural future.

Keywords: Supreme Court of Canada, Multiculturalism, Reasonable Accommodation, Religious Freedom, Veiling

Introduction

In popular Canadian discourse, discussions of both the *niqab* and the veil are filled with anxiety about the 'illiberal' practices that Muslim immigrants in particular bring to Western liberal democracies.[1] Policies of multiculturalism are invariably focused on questions of the status of women in racialised immigrant communities. These debates are often framed in terms of the limits of tolerance and what aspects of difference can be recognized by mainstream society. Practices such as veiling and polygamy are emphasized as feminism is pitted against multiculturalism in the politics of recognition.[2] Women's equality rights are posited as oppositional to the recognition of minority group rights

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1 Will Kymlicka, 'The New Debate on Minority Rights (and Postscript)' in Anthony Simon Laden and David Owen (eds), *Multiculturalism and Political Theory* (Cambridge University Press 2007) 25, 54-55.

2 See eg, Leti Volpp, 'Feminism Versus Multiculturalism' (2001) 101:5 Columbia Law Review 1181; See also, *Discover Canada: The Rights and Responsibilities of Citizenship* (Citizenship and Immigration Canada 2011) 9 ('In Canada, men and women are equal under the law. Canada's openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, "honour killings," female genital mutilation, forced marriage or other gender-based violence. Those guilty of these crimes are severely punished under Canada's criminal laws'); Iris M Young, 'Structural Injustice and The Politics of Difference' in Anthony Simon Laden and David Owen (eds), *Multiculturalism and Political Theory* (Cambridge University Press 2007) 87.

and often, as well, as oppositional to religious freedom by extension where minorities seek exemption from the application of general or secular rules.[3]

In the context of the current debates in Canada on the limits of religious freedom and the accommodation of group difference, this paper has two primary objectives: first, to critically reassess the Supreme Court of Canada's approach to balancing religious freedom, gender equality and multiculturalism and second, to problematize the principle of reasonable accommodation as the framework within which competing rights are balanced. Evaluating the potential of an intersectional approach to analyzing equality and discrimination, the focus of this inquiry is to suggest how the Court can better craft legal responses to these issues in a manner that is more attentive to the lived reality of racialised minority women. These issues will be examined through the lens of the Supreme Court of Canada's decision in *R v NS*, 2012 SCC 72 where the Supreme Court had to decide whether NS, a Muslim woman, bringing a criminal complaint of sexual assault, would be allowed to wear her niqab, a face veil, while testifying.

The case of *R v NS* concerned a Muslim witness at the preliminary hearing stage of a sexual assault trial, who wished to testify with her face covered by a *niqab*.[4] The question before the Supreme Court was whether permitting the witness to wear a *niqab* while testifying would create a serious risk to trial fairness.[5] The preliminary inquiry judge at the Ontario Court of Justice held a *voir dire* and concluded that NS' religious belief was 'not that strong' and ordered her to remove her *niqab*.[6] NS appealed this order and the decision went to the Ontario Superior Court of Justice.[7] Justice Marrocco held that NS could testify while wearing her *niqab* if she demonstrated a sincerely held religious belief but that her testimony could be excluded if the judge found that her *niqab* impeded cross-examination. NS then appealed to the Ontario Court of Appeal who held that if the witness' right to religious freedom and the accused's fair trial right were both engaged, and there was no reconciliation possible between these competing rights, the witness may be ordered to remove the *niqab*, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge.[8] NS appealed and the matter went before the Supreme Court of Canada.[9] The Supreme Court delivered its decision in December 2012, dismissing the appeal and remitting the matter to the preliminary inquiry judge. Judge Weisman at the Ontario Superior Court, who originally presided over the preliminary inquiry, then heard the matter. In deciding whether NS could be permitted to wear the *niqab* while testifying, he followed the directions issued by the Supreme Court and ruled that removing the *niqab* would be required for her to testify. This order was passed on 24 April 2013.[10]

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3 See Volpp ibid. Also see, Vrinda Narain, 'Critical Multiculturalism' in Beverley Baines et al (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012).

4 The *niqab* is a veil worn by some Muslim women, which covers the entire face leaving an opening only for the eyes.

5 *R v NS* 2012 SCC 72 at para 9, 353 DLR (4th) 577 (*NS* – SCC).

6 *R v NS* Preliminary order of Weisman J, 16 October 2008, ON Ct J (Prov Div) [unpublished].

7 *R v NS* 2009 95 OR (3d) 735, 191 CRR (2d) 228 (*NS* – ONSupCtJus).

8 *R v NS* 2010 ONCA 670 [96], 326 DLR (4th) 523 (*NS* – ONCA).

9 ibid.

10 *R v NS* 2013 ONSC 7019 (*NS – voir dire*); Allison Jones, 'Ontario Sex Assault: *Niqab* Must Be Removed by Accuser, Says Judge' *The Huffington Post Canada* (24 April 2013) online: The Huffington Post <http://www.huffingtonpost.ca/2013/04/24/ontario-sex-assault-niqab_n_3148983.htm> accessed 6 February 2015.

In November 2013, the Court ruled on a request by NS to avoid seeing or making eye contact with anyone except the judge, Crown counsel and court staff.[11] Vaillancourt J allowed the accommodation, but added the accused to the list, holding that the accused could not be denied their right to face their accuser. In the preliminary hearing in January 2014, NS chose to testify without her *niqab*. A separate viewing room was organized for the public, with a camera feed that would only show the back of her head. Finally, on 24 July 2014, the Crown withdrew the charges, stating that there was 'no reasonable prospect of conviction'.[12] The case was closed on the merits of the evidence, yet the question of whether testimony will be allowed under the *niqab* was left entirely open.

Raising questions of gender equality, religious freedom, multiculturalism, secularism and state neutrality, the *niqab* controversy that was center stage in *R v NS*, tested the limits of toleration and the accommodation of difference as illustrated by the three separate opinions rendered in the decision. Broadly stated, the issue before the Supreme Court was, when, if ever, a witness who wears a *niqab* for religious reasons can be required to remove it while testifying. The Court identified the two Charter rights engaged: the witness' freedom of religion and the accused's fair trial rights, including the right to make full answer and defense.[13] While this decision raises questions of the right to a fair trial and demeanor evidence, these issues are beyond the scope of this paper and will not be considered here. In this paper, I focus on those key aspects of the Supreme Court's decision that relate to religious freedom, notions of multiculturalism and the limits of reasonable accommodation.

Most recently in 2013, in Quebec, Bill 60, also known as *The Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*,[14] a legislative initiative of the former Parti Quebecois government, added to the simmering political debate on the limits of toleration and reasonable accommodation. Constructing women's equality as oppositional to group rights, Bill 60 illustrates the convergence of issues of gender equality, religious freedom, minority rights, secularism and state neutrality. Its avowed purpose is to set out a Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and to provide a framework for accommodation requests. The Bill effectively limits the right of women wearing the *niqab* to receive or deliver services from a range of public institutions when the wearing of the veil

11 Alyshah Hasham, 'Woman to remove niqab to testify in Toronto case' *The Toronto Star* (13 January 2014) <http://www.thestar.com/news/crime/2014/01/13/woman_to_remove_niqab_to_testify_in_toronto_case.html#> accessed 6 February 2015.

12 Alyshah Hasham, 'Sex-assault case that led to Supreme Court niqab ruling ends abruptly' *The Toronto Star* (17 July 2014) <http://www.thestar.com/news/gta/2014/07/17/sexassault_case_that_led_to_supreme_court_niqab_ruling_ends_abruptly.html> accessed 6 February 2015.

13 *NS* – SCC (n 5) 2. (The constitutional guarantee of religious freedom is enshrined at section 2(*a)* of the *Canadian Charter of Rights and Freedoms,* which states that: 'Everyone has the […] fundamental freedom [of]: (*a*) freedom of conscience and religion.' Moreover, an accused individual's right to make full answer and defense is enshrined at section 11(*d*), which states that: 'Any person charged with an offence has the right […] (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal', see *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11) (*Charter*).

14 Bill 60, *The Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Québec, 2013.

limits communication, hinders identification of the wearer, or presents security risks. This restriction would cover nearly every public institution including childcare centers, school boards and public health facilities. The Bill provides that requests for accommodation will be considered giving particular weight to principles of gender equality and state neutrality with respect to religion, and noting that considerations of cost are also relevant. Rather than achieving its avowed goals of greater integration and inclusion, arguably, this proposed law would serve to exclude Muslim women as citizens, not as a result of any action by community leaders, but by a liberal democratic state. This exclusion of Muslim women and encroachment on their rights results from a dogmatic implementation of secularism and an unyielding notion of neutrality, both of which must be considered in the context of a post 9/11 Islamophobia.

Situated within a fraught political and social context, the *NS* decision has implications that resonate far beyond the courtroom and the classroom; it has implications for the formulation of public policy, the treatment of minorities and for the conception of equal citizenship. The aim of this paper is to better understand the extent to which *R v NS* reveals both disjunctures and continuities with Canadian jurisprudence and with it, the lessons we can draw for the protection of constitutional rights going forward. Understanding how constitutional law is implicated in efforts to recognize diversity, engage citizens and uphold rights, makes this inquiry compelling and underscores its significance.

This paper contains three Parts. Part I sets out the analytical framework within which the veil is understood. It begins by examining how uncritical approaches to multiculturalism can be analytically reductive and can result in simplistic, stereotypical understandings of minority cultures. Setting out the context in which these issues are adjudicated, I suggest that the Court could have crafted a better response to NS' claim through a more nuanced understanding of discrimination, multiculturalism, and religious freedom. I argue that it is problematic, as in the dominant framework of state multiculturalism, to thus pit women's freedom of religion against state secularism. *R v NS* provides an opportunity to critically analyse the framework of reasonable accommodation and this paper will consider the extent to which this framework is useful in forwarding minority claims. While it may have short-term benefits, I am interested in determining whether, in the long term, this framework can adequately problematize normative hegemonies or structures of discrimination to promote substantive equality. Finally, I suggest that analysing NS' claim through the lens of intersectionality might have resulted in a more contextualised response to her particular location at the intersection of multiple axes of discrimination. Racialised women are at the centre of overlapping systems of subordination; this paper will consider the extent to which the lens of intersectionality can bring to light the particular ways in which they experience discrimination and inequality. Part II of the paper discusses the three opinions in the Supreme Court decision, the majority opinion, the concurring opinion and the dissent. In discussing each of these opinions, I consider the extent to which they are similar to or different from, prevailing understandings of minority rights and religious freedom set out in the analytical framework in Part I. Each opinion in the case reflects a particular understanding of multiculturalism and the recognition of minority rights, providing a fascinating snapshot of contemporary public discourse in Canada. Part III concludes by evaluating the implications of this decision for future minority rights and religious freedom claimants. My primary aim with this paper is

to better understand how individual and group tensions can be mediated and to consider the imperatives of reconciling governance in a pluralist society with the socio-specific realities of racialised minority women. An intended outcome of this paper is to help move the dialogue towards an inclusive notion of citizenship and deliberative democracy that will foster a commitment to a shared multicultural future.

I. Contextualizing the Analytical Framework

A. Interrogating Multiculturalism

The central role of the *niqab* in *NS* raises a number of interlocking questions relating to gender equality, religious freedom and the limits of multiculturalism: what should be done when minority claims for accommodation conflict with mainstream norms of gender equality? How should the principles of substantive equality be applied when considering the complexities of the rights of individuals, particularly women, within religious and cultural minorities?[15] The context of the veil in the Canadian imagination means that there is a real danger of regulating (and therefore constraining) women's religious freedom in a liberal democracy. The veil is understood simplistically as a symbol of oppression, signifying passivity, a lack of agency and victimization. It becomes very quickly the focus of neo-colonial attitudes and narratives of saving and rescue are invoked.[16] Those seeking to ban the veil are portrayed, or portray themselves, as progressive, modern and secular and, most importantly, saving Muslim women from their backward outdated customs.[17] Yet, women wear the veil for many different reasons and the veil has multiple complex meanings: it is a powerful marker of difference, and an essentialized symbol of a 'traditional' identity.[18] Veiling should not be reflexively associated with fundamentalism or Islamism.[19] At the same time, together with its association with cultural norms and tradition, it is also an expression of a new de-territorialized Muslim political identity in the context of migration and diasporic communities in Western democracies.[20] As Homa Hoodfar notes, there are particular political contexts to veiling and re-veiling movements in diasporic communities. Often, these movements are a response to Islamophobia and constitute a defensive self-assertion of political identity.[21] Finally, it is important to respect the choices made by women – whether to veil or not to veil. As Martha Nussbaum argues, restrictions on veiling justified on grounds of gender equality, liberty, secularism

15 For a detailed discussion on veiling, see eg, Homa Hoodfar, 'The Veil in their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women' in David Lloyd & Lisa Lowe (eds), *Politics of Culture in the Shadow of Capital (Post-Contemporary Interventions)* (Duke University Press 1997); and Natasha Bakht, 'Veiled Objections: Facing Public Opposition to the *Niqab*' in Lori Beaman (ed), *Reasonable Accommodation: Managing Religious Diversity* (UBC Press 2012).

16 See eg, Hoodfar (n 15).

17 See eg, Sherene H Razack, 'The Sharia Law Debate in Ontario: The Modernity/Pre-Modernity Distinction in Legal Efforts to protect Women from Culture' (2007) 15:1 Fem Legal Stud 3; Narain (n 3); and Hoodfar (n 15) 5.

18 Hoodfar (n 15) 15; Pnina Werbner, 'Veiled Interventions in Pure Space: Honour, Shame and Embodied Struggles among Muslims in Britain and France' (2007) 24:2 Theory Culture Society 161, 172.

19 Werbner (n 18).

20 ibid 172-74.

21 Hoodfar (n 15) 18.

and state neutrality are 'utterly unacceptable' in a society committed to equal liberty and respect.[22]

While undoubtedly the *niqab* is contested even among Muslim women, and while it does raise questions of agency and choice, the language of a simplistic multiculturalism that locates all oppression in racialised minority cultures and cultural practices prevents critical self-reflection, both within these communities and within mainstream society itself. In dominant understandings of multiculturalism, secularism is posited as a modern and liberating force for minority racialised women in sharp contrast to religious practices that condemn women to subordinated roles in society.[23] Yet, it prescribes and justifies the regulation of Muslim women in the name of equality and state neutrality. In this understanding of multiculturalism as the champion of women's rights, simplistic binaries of secularism/religious, modern/pre modern binaries are reified and serve to disempower Muslim women.[24]

The curtailing of religious freedom by a dogmatic understanding of secularism together with an uncritical notion of multiculturalism must be considered in the political context of post-9/11 Islamophobia.[25] Rikke Andreassen and Doutje Lettinga point out '[t]hese debates on the limits of tolerance and the accommodation of difference arise from within a particular context – the context of the state as the preserver and securer of gender equality and secularism and state neutrality.'[26] This uncritical notion of multiculturalism and the refusal to interrogate or problematize state secularism and neutrality, as reflected in the opinion of LeBel and Rothstein JJ, frame veiling as a threat to universal values and principles of gender equality, emancipation, secularism and tolerance.[27] Andreassen and Lettinga further point out that 'the nationalizing of gender equality – by inscribing gender equality as an integrated part of a hegemonic national culture that is being threatened by the culturally "other" – results in exclusionary and racialised understandings of the national community.'[28] Such an understanding falls within an us/them binary and as a result, 'unveiling becomes a marker of national belonging' as demonstrated in LeBel and Rothstein JJ's concurring opinion.[29]

The emphasis on veiling as a symbol of gender inequality that cannot be tolerated by a liberal democratic state making its regulation imperative, demonstrates the persistence of the Orientalist framework in efforts to rescue Muslim women from their back-

22 Martha Nussbaum, 'Veiled Threats?' *The New York Times* (11 July 2010) online: The New York Times – The Opinion Pages <http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/?_r=0> accessed 6 February 2015.

23 See eg Volpp (n 2). See also Susan Moller Okin, 'Is Multiculturalism Bad for Women?' *Boston Review* (October/November 1997) online: <http://new.bostonreview.net/BR22.5/okin.html> accessed 6 February 2015.

24 Razack (n 17) 19-22.

25 See eg, Hilal Elver, 'Secular Constitutionalism and Muslim Women's Rights: Global Debate on Headscarf' in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana (eds), *Feminist Constitutionalism* (Cambridge University Press 2012). (Significantly, even the Bouchard-Taylor Commission's Report notes the context of anti-Muslim sentiment post 9/11).

26 Rikke Andreassen & Doutje Lettinga, 'Veiled Debates: Gender and Gender Equality in European National Narratives' in Sieglinde Rosenberger & Birgit Sauer (eds), *Politics, Religion and Gender: Framing and Regulating the Veil* (Routledge 2012) 17, 21.

27 ibid.

28 ibid.

29 ibid 31.

ward laws.[30] Sherene Razack argues that the regulation of the conduct of Muslim migrant communities, justified in the name of gender equality, resorts to culturalist arguments that Muslims are inherently patriarchal and uncivilized. A critical impact of this justification of intervention to 'save' Muslim women is the resurrection of narratives of saving and rescue, which disempower Muslim women.[31] This discursive construction of Muslim women as victims without agency makes it problematic for Muslim women to challenge gender inequality within community structures. Feminists who support restrictions on veiling come uncomfortably close to those on the right who seek the erasure of minority difference.

These perspectives on veiling represent an uncritical perspective on multiculturalism that is singularly focused on what differences the state should accommodate and the extent to which those differences should be accommodated.[32] As a result, the debate is framed around the limits of toleration; the notion that 'we' are willing to tolerate some cultural differences but not others.[33] Framing the debate in this way introduces an idea of the normalizing of culture, where certain norms and cultural practices are accepted as the norm and the yardstick against which 'other' cultural values must be measured. It is the 'we' who debate these questions of accommodation of dress codes or food habits, among others, such that majority practices are 'normalized' while racialised minorities have little voice in these discussions.[34]

B. Reasonable Accommodation

In recent years, religious claimants in Canada have been making wide claims for freedom from mainstream norms and the Court has demonstrated a generous reasonable accommodation approach to interpreting religious freedoms.[35] In *Syndicat Northcrest v Amselem*, the Supreme Court of Canada specified that the state could not rule on religious dogma.[36] In *Multani v Commission scolaire Marguerite-Bourgeoys*, the Court was emphatic about its message of multiculturalism, reasonable accommodation and religious freedom, which were seen as fundamental organizing principles of Canadian life.[37] In *Bruker v Marcovitz*, the Court was emphatic that Canada's growing diversity had resulted in the judicial recognition of the value of upholding multiculturalism and respect for difference and underscored the centrality of s 27 and the constitutional value of multiculturalism:

> 'Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections

30 Razack (n 17) 16.
31 ibid 6.
32 ibid 84-86.
33 ibid 86.
34 ibid 87.
35 See Richard Moon, 'Liberty, Neutrality, and Inclusion: Religious Freedom Under the *Canadian Charter of Rights and Freedoms*' (2002) 41:3 Brandeis LJ 2.
36 *Syndicat Northcrest v Amselem*, 2004 SCC 47 [50], 2 SCR 551.
37 *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 71, 78, 1 SCR 256.

found in human rights codes to their constitutional enshrinement in the Canadian Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.'[38]

As Justice Abella explained further in *Bruker*, deciding what aspects of difference can be accommodated must be a contextual, purposive exercise focused on providing the benefit of the protection of the *Charter* on the claimant:

'The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.'[39]

The Court's willingness to adopt a more generous reasonable accommodation approach was interrupted with the decision in *Alberta v Hutterian Brethren of Wilson Colony*, where the Court signaled a greater deference to secular, government objectives in limiting religious freedom and a move away from the understanding of reasonable accommodation as articulated in earlier jurisprudence.[40]

What does the *NS* decision signify for future claims asserting difference? All three opinions begin from the same starting point: that the veil is a problem that interrupts the public-private divide and that the courts must contend with this problem through a delicate balancing of religious freedom, multiculturalism, gender equality, and state neutrality; that the right of minorities to 'integrate' must be contextualised within certain core or unconditional principles and core Canadian values. The difference lies in the vastly varying approaches to conceptualizing and adjudicated the content, scope and conceptualizing of both – the right to integrate and the core Canadian values. As Faisal Bhabha notes, the development of the religious freedom doctrine from the Court seems to suggest a theory of religious freedom 'that is defined and shaped by the normative priority of respecting difference in a multicultural society, coupled with a concomitant duty of belonging to an integrated society.'[41]

R v NS provides an opportunity to critique notions of reasonable accommodation. The analytical framework of accommodation and tolerance constrains the terms of the debate; it strengthens notions of 'us' and 'them'. The term itself further otherizes as it is the limits of toleration that animate the debate rather than a real consideration of Muslim women's rights.[42] Lori Beaman's critique of reasonable accommodation underscores the

38 *Bruker v Marcovitz*, 2007 SCC 54, 3 SCR 607, 1.
39 ibid 2. Faisal Bhabha, 'From *Saumur* to *L. (S.)*: Tracing the Theory and Concept of Religious Freedom under Canadian Law' (2012) 58 Sup Ct L Rev (2d) 109.
40 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 paras 66-71, 2 SCR 567 (*Hutterian Brethren*).
41 Bhabha (n 39) 131.
42 See eg Narain (n 3).

limits of toleration and the way it reinforces relations of power and privilege. In the reasonable accommodation of difference, invariably, minority practices are measured against an unquestioned mainstream norm. The terms of the debate are neither questioned nor challenged, and the binary constructions of 'us' and 'them' are thereby strengthened. In such an understanding of the accommodation of difference, there is insufficient critical reflection on power relations and hierarchies, of who gets to decide, and what the limits of tolerance are. Arguably, what we should be aiming at is respect rather than tolerance.[43] With this focus on cultural difference and the possibilities of accommodation, such an analytical framework results in obfuscating real issues of structural inequality and the construction of difference.[44] As Beaman notes,

> '[…] *R v NS* provides an opportunity to explore the ways in which the concepts of tolerance and accommodation work to undermine any substantive or deep sense of equality. Concepts such as these do important and damaging work in that the power relations they maintain are based in inequality. They invoke a colonial privilege that "we" will accommodate "you." The language of reasonable accommodation, as with the language of tolerance, moves us further from, rather than closer to, equality. In the case of *NS*, it singles out *niqab*-wearing women as women asking for special privilege, which allows space for arguments based on colonial fear and racism rather than on any genuine disadvantaging or inequality.'[45]

Beaman is wary of terms like accommodation, which, she argues, move those who are Other further away from equality.[46] In this framework, difference is the special exception while mainstream culture is simultaneously normalised,[47] which further otherizes minority groups.[48] An uncritical policy of multiculturalism that is premised on stereotypical understandings of culture, of group definitions and state-imposed identities perpetuates a notion of governmentality, of control and managing diversity, forcing a notion of state control that 'eludes notions of equality.'[49] This mode of understanding allows value-laden decisions to be dressed up as neutral by allowing majority norms to set the limits of accommodation.[50]

On the other hand, Natasha Bakht points out that for minorities, the conceptual framework of reasonable accommodation has allowed for an expansion in real terms of the recognition of minority difference. While acknowledging the limits of this model, she advocates a pragmatic engagement with the framework of reasonable accommodation. Such a pragmatic engagement would prevent a rollback of, or backlash against, minority rights. Nevertheless it remains true that the framework of reasonable accommodation has certain conceptual limitations and flaws, most notably that it does not enable equality seeking Others to challenge the institutional and structural aspects of disadvantage

43 ibid.
44 Lori G Beaman, '"It Was All Slightly Unreal": What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?' (2011) 23 Can J Women & L 442, 443-45.
45 ibid 443.
46 ibid 445.
47 See eg, Catharine MacKinnon, 'Difference and Domination: On Sex Discrimination' in Elizabeth Hackett & Sally Haslanger (eds), *Theorizing Feminisms: A Reader* (Oxford University Press 2005).
48 Beaman (n 44) 449.
49 ibid 447.
50 ibid 447-51.

and discrimination, it simply allows for claiming an exception. While this may have certain tangible short-term benefits, it may not be as helpful in the long term to forward substantive equality.

C. An Intersectional Lens to *NS*

Over twenty years ago, Kimberlé Crenshaw coined the term 'intersectionality' to delineate a mode of analysis that critiqued single-axis approaches to understanding sexism or racism.[51] Intersectionality is a heuristic device focusing on overlapping or multiple identities that expose the ways in which single-axis thinking – or the notion that discrimination only happens through one system at a time – undermines legal thinking and approaches to formal and substantive equality.[52] Intersectionality calls for the lived experience of discrimination along multiple axes to inform the legal analysis and response to it. Crenshaw's intervention brought a key set of insights from women-of-color feminism and other critical intellectual traditions about the limits of 'equality' and added these understandings to the interrogations of the discrimination principally taken up in critical race theory.[53] Scholars have used intersectionality as a mode of analysis to draw attention to the violence of legal and administrative systems that articulate themselves as race and gender neutral but are actually sites of what Dean Spade calls 'the gendered racialization processes that produce the nation-state'.[54] In advocating intersectionality as a method of analysis, Catharine McKinnon writes that it advances an understanding of how multiple axes of discrimination reflect the structural, political, and representational realities of racialised women. Intersectionality as a mode of analysis can counter the essentialising impulses of legal analysis.[55] As MacKinnon writes, 'intersectionality both notices and contends with the realities of multiple inequalities as it thinks about "the interaction of" those inequalities in a way that captures the distinctive dynamics at their multidimensional interface.'[56] Racialised women are at the centre of overlapping systems of subordination and it is the lens of intersectionality that can bring to light the particular ways in which they experience discrimination and inequality.[57]

I rely on an understanding of intersectionality as a heuristic device, as a way of framing analysis rather than as a theoretical concept.[58] As Avtar Brah and Ann Phoenix argue, intersectional framing raises many pressing questions with regard to the subjectivity of the subaltern veiled Muslim woman. It demonstrates the way in which the discourse of saving and rescue of the veiled women and the discourse of democracy are used to justify hegemonic universal norms. Looking at *NS* through an intersectional lens is the starting point for challenging essentialised thinking. This challenge to essentialist thinking 'holds critical importance today when the allure of new Orientalisms and their concomi-

51 See Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) U Chicago Legal F 139.
52 Sumi Cho et al, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38:4 Signs 785, 787.
53 Dean Spade, 'Intersectional Resistance and Law Reform' (2013) 38:4 Signs 1031.
54 ibid.
55 Catharine MacKinnon, 'Intersectionality as Method: A Note' 38:4 Signs 1019, 1021.
56 ibid.
57 ibid 1020.
58 ibid.

tant desire to unveil Muslim women has proved to be attractive even to some feminists in a 'post September 11' world.'[59]

A key feature of intersectional framing is that it de-centres the normative subject of feminism based on the understanding that systems of oppression are interlocking.[60] Indeed the importance of intersectionality is that it disrupts simplistic binaries of public/private, religious/secular, and modern/traditional. Most important, it disrupts notions of the universal woman and the smugness of the status quo with regard to race, ethnicity and religion.[61] Critical multiculturalism understood through the lens of intersectionality would allow the court to acknowledge the specificity of NS as a racialised gendered survivor of sexual assault.

Intersectional framing allows for working within, and through cultural specificities and calls for ongoing dialogue in mediating tensions across cultural difference which is of particular importance now when the cultural differences between Muslim and non-Muslim women are presented as insurmountable.[62] The *NS* case presents a number of intersecting features that the court could have better addressed to achieve substantive equality.[63] An intersectional analysis demarginalizes the particular difficulties faced by racialised women when they come before the courts with a complaint of sexual assault.[64] NS' location as simultaneously a racialised Muslim woman along multiple axes of discrimination necessitates an intersectional approach to crafting a legal response to her claim. In *NS*, intersectionality would require that the court respond to NS' particular location as a survivor of sexual assault, as a racialised minority woman in a legal system that has historically re-victimised women who have been sexually assaulted.[65]

An intersectional analysis in *NS* provides a framework to examine the ways in which sexual assault interacts with religion and culture.[66] Bakht notes that historically, 'sexual assault is an area of law that has been fraught with misogyny and racism. Although there have been efforts at legal reform, change on the ground has been slow.'[67] When evaluating the claims of racialised minority women, it is all the more critical to ensure that their equality rights are understood by understanding the relationship between gender, race, ethnicity, and sexual violence. While the number of women in Canada who wear a *niqab* might be low, Bakht argues that 'adequately addressing their plight in this context is just and will ameliorate the workings of the judicial system for all women.'[68] In essence, an intersectionality framework transforms the sex-based legal concept of sexual assault and expands the justice of the concept to all women.

Beaman identifies aspects of *NS* which the Court should have better acknowledged. First, there is a persistent neo-colonial discourse that evaluates the significance of wearing a *niqab*. Second, although the majority opinion did signal its understanding that norms had to be revised and myths questioned, the Court should have shown a greater

59 Avtar Brah and Ann Phoenix, 'Ain't I a Woman? Revisiting Intersectionality' (2004) 5:3 Journal of International Women's Studies 75, 77.
60 ibid 78.
61 ibid 82, 83.
62 ibid.
63 See eg, Beaman (n 44).
64 ibid.
65 Bakht (n 15).
66 ibid 8.
67 ibid 7.
68 ibid 9.

willingness to re-evaluate traditional common law notions about demeanor, to challenge existing norms and come up with new norms and new ways of including marginalized groups within the legal system. Finally, the Court should have taken better account of Canada's context of multiculturalism and diversity, following *Big M*[69] *and Amselem*, which arguably would have entailed an intersectional understanding of discrimination and inequality in this particular case.[70] As Dianne Pothier argues, an intersectional analysis provides us with the opportunity for a more complex and richer understanding of equality and discrimination, which thereby enables the Court's response to be relevant to real people's real lived experiences.[71]

II. *R v NS*, 2012 SCC 72

A. Pragmatic Balancing?

Chief Justice Beverley McLachlin wrote the majority opinion on behalf of herself, Deschamps, Fish and Cromwell JJ. In determining how the state should respond to a witness whose sincerely held religious belief requires her to wear a *niqab* while testifying, the majority rejected an all-or-nothing response. McLachlin CJC insisted on a pragmatic balancing, avoiding extreme responses to balancing competing interests, which would result in an all-or-nothing judicial response.[72] Instead, the majority considered whether it was possible to accommodate both the right to religious freedom and the right to a fair trial, and the Chief Justice adopted the *Dagenais*/*Mentuck* approach to balancing competing rights and freedoms.[73]

The *Dagenais/Mentuck* framework as set out by the Chief Justice was aimed at reconciling competing rights that arise at common law. Although the context of these cases was different, the principles articulated have a broader application and the majority found this framework to be most suitable for reconciling the rights conflicts that arose in *NS*.[74] Applying this framework, the majority set out the following questions raised in the context of reasonable accommodation and reconciling of two rights: NS' freedom of religion and the accused's fair trial rights, including the right to make full answer and defense under ss. 7 and 11(*d*).[75]

> `1. Would requiring the witness to remove the *niqab* while testifying interfere with her religious freedom?
> 2. Would permitting the witness to wear the *niqab* while testifying create a serious risk to trial fairness?
> 3. Is there a way to accommodate both rights and avoid the conflict between them?

69 *R v Big M Drug Mart Ltd,* [1985] 1 SCR 295, 18 DLR (4th) 321 (*Big M*).
70 Beaman (n 44) 455.
71 Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experience' (2001) 13 CJWL 37.
72 *NS* – SCC (n 5) 1-2.
73 Ibid 7-9. The *Dagenais/Mentuck* approach to balancing competing rights was first outlined in *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 120 DLR (4th) 12 and further developed in *R v Mentuck* 2001 SCC 76, 3 SCR 442.
74 ibid.
75 ibid para 2.

4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so?'[76]

In considering the first question, and relying on the Court's decision in *Amselem*, the Chief Justice reasoned that the only issue to be considered at this stage was whether the witness sincerely believed that removing her *niqab* violated her sincerely held religious belief. Significantly, McLachlin CJ stated that the preliminary judge's inquiry into sincerity of belief versus strength was not an appropriate course of inquiry, that it was not correct for the preliminary inquiry judge to conclude that because NS had in certain other contexts and circumstances agreed to remove her *niqab* this was an indication that while her belief may have been sincere, it was not sufficiently 'strong.' The Majority went on to say that at this stage, only the sincerity, rather than the strength, of the religious belief is at issue.[77] However, this is perhaps an ambivalent or ambiguous application of *Amselem*, which does not suggest that strength must at any point be argued.

The majority opinion is unclear. While, on the one hand, it seems that the Chief Justice rejected the sincerity versus strength argument, she goes on to suggest that it might be relevant at another stage of the analysis. The reasoning here that past practices, or departure from past practices, are not to be measured, seemingly contradicts her assertion that it is sincerity and not strength that must be assessed. To this extent, then, the majority opinion is contradictory and not an unequivocal rejection of the sincerity versus strength argument. However, this did not prevent the majority from concluding that NS had demonstrated a sincere religious belief in refusing to testify without her *niqab*.[78]

Next the Chief Justice considered whether permitting the witness to wear the *niqab* while testifying would create a serious risk to trial fairness.[79] Drawing attention to the absence of expert evidence 'on the importance of seeing a witnesses' face for effective cross examination and accurate assessment of a witnesses' credibility,'[80] the majority relied on the common law assumption that the ability to see a witnesses' face is an important feature of a fair trial.[81] McLachlin CJ concluded that 'there is a strong connection between the ability to see that face of a witness and a fair trial' and went on to hold that where evidence is uncontested and credibility assessment and cross-examination were not in issue then the witness would be allowed to wear the *niqab*.[82] Thus, if wearing the *niqab* does not pose a serious risk to a fair trial, a witness may wear a *niqab*. What this means is that the determination must be adjudged on a case-by-case basis, weighing the fair trial rights of the accused. While this might seem to be a reasonable compromise, in actual fact, there would be few cases where this would be decided in favor of the *niqab* wearer as demonstrated by the latest holding in the case by the preliminary inquiry judge.

The majority went on to consider whether there was a way to accommodate both rights and avoid any conflict between them.[83] Using the *Dagenais/Mentuck* framework,

76 ibid para 9.
77 *NS* – SCC (n 5) 11-14.
78 ibid 14.
79 ibid 24-29.
80 ibid 17.
81 ibid 21.
82 ibid 27-28.
83 ibid 30.

the majority noted that once two competing rights are understood to be engaged, this framework is the appropriate one in which to resolve competing claims in a way that will preserve both rights. For the Court, this requires accommodation or considering 'reasonably available alternative arrangements.'[84] The majority directs that once this matter 'returns to the preliminary inquiry judge, then the parties will have to place evidence before the court relating to possible options for accommodation of the potentially conflicting claims.'[85] So it is clear the Supreme Court abstained from making any pronouncement here on possibilities for accommodation – and sent this crucial issue back to the Ontario Superior Court to be decided in light of evidence presented, by both parties, regarding the possibility of accommodation.

Arguably, the majority here dodged the issue and did not give clear instructions or directions to the preliminary inquiry judge. It is possible to argue that, in an effort at pragmatic balancing, it was inevitable that in the absence of evidence, the matter would be sent back to the preliminary inquiry judge, as the Supreme Court did not feel itself capable of making that determination. In contrast, in her dissenting opinion, Abella J unequivocally asserted that the witness must not be compelled to remove her *niqab* while testifying.

The majority then turned to the final aspect, balancing the deleterious effects of requiring the witness to remove her *niqab* with the salutary effects of allowing her to testify while wearing it. Here, the majority clearly stated that 'if there is no reasonably available alternative that would avoid a serious risk to trial fairness, while conforming to the witnesses' religious belief, the analysis moves to the next step in the *Dagenais/Mentuck* framework.'[86] Chief Justice McLachlin points out that in this final balancing stage, the *Dagenais*/*Mentuck* proportionality inquiry is similar to the final part of the *Oakes* test where the salutary and deleterious effects of insisting that the witness remove her *niqab* if she is to testify are to be considered.[87] McLachlin CJC suggested certain considerations that may be helpful in making this determination, such as judging the importance of this practice to the claimant, and the degree of state interference with the religious practice. She also suggested that the Court must consider whether there are measures to limit facial exposure, and that the judge should also consider the broader societal impact of requiring a witness to remove the *niqab* in order to testify.[88]

Notably, Chief Justice McLachlin acknowledged the arguments of NS and supporting interveners that if *niqab*-wearing women are required to remove the *niqab* to testify, this might result in their reluctance to report offences and exclude them from participation in the criminal justice system. She noted that these considerations – particularly in the context of sexual assault complaints – might be 'especially weighty.'[89] The Chief Justice drew attention to the extent to which such crimes remain under reported, as well as to the efforts made to change laws to encourage women and children to come forward to testify.[90] On the other hand, McLachlin CJC also considered the salutary effects of requiring a witness to remove the *niqab* while testifying: 'the important consideration of the

84 ibid 32.
85 ibid 31.
86 ibid 34.
87 ibid 35.
88 ibid 36.
89 ibid 37.
90 ibid.

accused's fair trial rights as well as preserving the repute of the administration of justice.'[91] The accused's right to a fair trial is of the utmost importance when the accused's liberty is at stake. As such, all of these factors must be considered by the preliminary inquiry judge in determining whether 'the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so.'[92] Considering the alternatives, McLachlin CJ concluded that the judge should require the witness to remove the *niqab* while testifying if the *niqab* does, in fact, pose a serious risk to a fair trial, and there is no way to accommodate both rights and 'the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so.'[93]

Next, McLachlin CJ considered two positions on the wearing of a *niqab* in court: that the witness must always be permitted to wear a *niqab* in court and the contrasting view that she must never be permitted to do so. For McLachlin CJ, both of those positions are generally unacceptable. Turning first to the position that the witness must *always* be permitted to wear a *niqab* in court, the Chief Justice noted the difficulty with this position, namely, that it 'offers no protection for the accused's fair trial interest or of the state's correlative interest in avoiding a wrongful conviction.'[94] Moreover, McLachlin CJ remained unconvinced that the face of a witness does not have to be uncovered in order to assess witness credibility. Indeed, for the Chief Justice, 'under the *Dagenais/Mentuck* framework, such a view that witnesses can never be ordered to remove their *niqab* cannot be accepted.'[95] On the other hand, McLachlin CJ rejected the contrasting view that under no circumstances should the courtroom accommodate personal religious beliefs, as courtrooms are neutral spaces. She noted that such a view was 'inconsistent with Canadian jurisprudence,' and asserted that 'such a position would limit religious rights where there is no countervailing right and hence no reason to limit them as failing the proportionality test as outlined in the *Oakes* test which has consistently guided *Charter* jurisprudence.'[96]

The Chief Justice's opinion is notable for reiterating that Canadian jurisprudence is committed to reconciling conflicting rights through accommodation and case-by-case balancing. First, she rejected an absolute rule calling for no role for religious belief. It would signify that there must be no effort made to accommodate sincere religious belief; there would be no consideration or effort to minimize intrusion on this right under such a position. Second, she rejected the position that the courtroom was a neutral space noting that to 'remove religions from the courtroom was not in the Canadian tradition.'[97] Third, she reaffirmed that the Canadian approach of the last sixty years to resolving potential conflicts between freedom of religion and other values had been to respect religious belief and to accommodate if at all possible.[98]

Finally, she rejected an approach which would never allow a witness to testify while wearing a religious facial covering as it was incompatible with the principle set out in s 1 which calls for limiting *Charter* rights only to the extent that such a limit can be reason-

91 ibid 37-38.
92 ibid 45.
93 ibid 38.
94 ibid 34.
95 ibid 49.
96 ibid 51.
97 ibid 53.
98 ibid 54.

ably justified in a free and democratic society. In her view, such an uncompromising ban on the *niqab* in the courtroom would be contrary to the s 1 principle and it would result in imposing a limit on religious freedom even in those cases where no limit was justified.

The Court noted that the *Dagenais* approach is similar to the *Oakes* test, requiring that there must be a proportionality inquiry. Indeed, 'as *Dagenais* makes clear, this is a proportionality inquiry,' similar to the final part of the *Oakes* test and '[thus] the effect of insisting that the witness remove the *niqab* if she is to testify must be weighed against the effect of permitting her to wear the *niqab* on the stand.'[99] Notably, the Court stated that where the wearing of a *niqab* does not pose a serious risk to trial fairness, then a witness who wishes to wear it as a matter of sincere religious belief will be allowed to do so.[100] 'In terms of the deleterious effects of requiring the witness to remove her *niqab* while testifying, the judge must look at the harm that would be done by limiting the sincerely held religious practice.'[101] This approach offers some hope for religious minority women that the state is committed to accommodating religion in public spaces and in public institutions.

The majority noted the broader societal harms if women were forced to remove their *niqab* to testify. The Court acknowledged that it would prevent their participation in the criminal justice system; the wrongs perpetrated them would remain unpunished. The Court also noted the specific context of sexual assault, as an under reported crime.[102] This reaffirmation of a contextual analysis with regard to sexual assault is an encouraging aspect of the decision for minority women. As per the Chief Justice:

> 'The judge should also consider the broader societal harms of requiring a witness to remove the *niqab* in order to testify. N.S. and supporting interveners argue that if *niqab*-wearing women are required to remove the *niqab* while testifying against their sincere religious belief they will be reluctant to report offences and pursue their prosecution, or to otherwise participate in the justice system. The wrongs done to them will remain un-redressed. They will effectively be denied justice. The perpetrators of crimes against them will go unpunished, immune from legal consequences. These considerations may be especially weighty in a sexual assault case such as this one. In recent decades the justice system, recognizing the seriousness of sexual assault and the extent to which it is under-reported, has vigorously pursued those who commit this crime. Laws have been changed to encourage women and children to come forward to testify. Myths that once stood in the way of conviction have been set aside.'[103]

The Court goes on to consider the salutary effects of requiring the witness to remove her *niqab*: identifying these as preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice, including a consideration that what is at stake is an individual's liberty.[104]

99 ibid 35.
100 ibid 29.
101 ibid 36.
102 ibid 37.
103 ibid.
104 ibid 37, 38.

It is indeed remarkable that the majority reaffirmed the place of reasonable accommodation of religious practices in Canadian jurisprudence and endorsed the use of reasonable accommodation not just within private institutions and private negotiations but also more importantly in the public arena – the Courtroom. From the perspective of religious minority claimants, it is important that the majority rejected the argument that to accommodate religion in the courtroom would be to compromise state neutrality as well as the neutrality of public institutions.[105] Drawing on Canadian jurisprudence, courtroom practice and the established Canadian principle of the requirement of accommodation up to the point of undue hardship, the Court reiterated the duty of state institutions to accommodate sincerely held religious beliefs as far as possible. Analyzing the situation before the Court in this particular instance, the majority ruled that an outright refusal to reasonably accommodate *niqabi* women is not reasonable without justification. Invoking the proportionality test of the *Oakes* test, McLachlin CJ noted that this was the correct approach to balancing competing rights and it has guided *Charter* jurisprudence since it was first formulated in *Oakes*.[106]

The Chief Justice gave three reasons for accommodating religion in the courtroom:

> 'First, […] our jurisprudence teaches that clashes between rights should be approached by reconciling the rights through accommodation if possible, and in the end, if a conflict cannot be avoided, by case-by-case balancing: *Dagenais*. An absolute rule that courtrooms are secular spaces where religious belief plays no role would stand as a unique exception to this approach.[107] Second, to remove religion from the courtroom is not in the Canadian tradition. […] The practice has been to respect religious traditions insofar as this is possible without risking trial fairness or causing undue disruption in the proceedings.[108] Third, the Canadian approach […] to potential conflicts between freedom of religion and other values has been to respect the individual's religious belief and accommodate it if at all possible […] The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law.'[109]

She further stated,

> 'This brings me to the final reason for rejecting an approach that would never allow a witness to testify while wearing a religious facial covering. It does not comport with the fundamental premise underlying the *Charter* that rights should be limited only to the extent that the limits are shown to be justifiable. This principle is set out in s. 1 of the *Charter*, in relation to laws – laws that limit the rights guaranteed by the *Charter* are invalid to the extent that the limit is not reasonably justified in a free and democratic society. Significantly the majority opinion asserts that a clear rule that would always, or one that would never, permit a witness to wear the *niqab* while

105 ibid 51 (According to the Chief Justice: '[T]his option must also be rejected. It is inconsistent with Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible.')
106 ibid 51.
107 ibid 52.
108 ibid 53.
109 ibid 54.

> testifying cannot be sustained. Always permitting a witness to wear the *niqab* would offer no protection for the accused's fair trial interest and the state's interest in maintaining public confidence in the administration of justice. However, never permitting a witness to testify wearing a *niqab* would not comport with the fundamental premise underlying the *Charter* that rights should be limited only to the extent that the limits are shown to be justifiable. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. Competing rights claims should be reconciled through accommodation if possible, and if a conflict cannot be avoided, through case-by-case balancing. The *Charter*, which protects both freedom of religion and trial fairness, demands no less.'[110]

There are certain difficulties with the majority opinion. First, it did not fully consider the impact on the witness' religious freedom if she is forced to testify without her *niqab*. While it considered the broader societal harms, of forcing *niqabi* women to de-veil, the concrete impact was curiously glossed over. A related difficulty is that the majority opinion did not contextualize sufficiently the importance of the *niqab* to the witness. It would seem that the reason for this lack of complexity in understanding the religious significance of the *niqab* to the wearer stems from an inadequate of consideration of the scope and content of the right to religious freedom.

This hesitation of the majority to engage with the religious freedom guarantee in a meaningful way may arguably be traced to the Chief Justice's reluctance to be drawn into a discussion of the 2(*a*) guarantee in *Hutterian Brethren*.[111] A related gap in this opinion is the reluctance to consider fully the notion of meaningful choice, as pointed out by Justice Abella in her dissent. According to the Chief Justice,

> '[F]reedom of religion presents a particular challenge […] because of the broad scope of the *Charter* guarantee. Much of the regulation of the modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs […].'[112]

In that case the lack of consideration of the significance of the religious prohibition on photographs in *Hutterian Brethren* led to an arguably de-contextualized decision regarding the mandatory requirement of a photograph for the Alberta driver's license.

Despite the promising discussion of the principle of reasonable accommodation, it remains unclear from this decision whether in fact the direction given to the lower courts is to reasonably accommodate *niqabi* women and to what extent. To this effect, then, the Supreme Court majority decision sends an insufficiently clear message to the lower courts as to what priority is to be given to religious freedom and the accommodation of difference. Furthermore, what might be seen as a victory for *niqab*-wearing women is quickly revealed to be an ambivalent victory. As the Chief Justice herself pointed out, it is only in cases where there is uncontested and uncontroversial evidence that the fair trial rights of the accused will not be engaged for the purposes of limiting religious free-

110 ibid 56.
111 *Hutterian Brethren* (n 40).
112 ibid 36.

dom.[113] In other words, she conceded the presumptive right of women to wear the *niqab* while testifying only in those cases where the evidence is uncontroverted and uncontested. Yet, as the *NS* case demonstrates, in a criminal trial such as a sexual assault case, it is unlikely that the evidence will be uncontested, which effectively means that the witness will not be allowed to testify while wearing her *niqab*. Indeed, this is how the preliminary inquiry judge interpreted the directions from the Supreme Court in his decision of 24 April 2013, ruling that NS would not be permitted to testify with her *niqab*.

Whatever one might make of the final balancing, it is a matter of some optimism that the majority rejected extreme positions and decided that rather than an all or nothing approach, it would allow the witness to testify with her face covered unless this unjustifiably impinges on the accused's fair trial rights. On a positive reading of the decision, it is promising that the Chief Justice asserts that the answer to balancing competing rights lies in a just and proportionate balance between freedom of religion on the one hand, and trial fairness on the other, based on the particular case before the Court.

At the same time, this was a missed opportunity for the Court to uphold the rights of minority racialised women by pursuing a purposive and contextual interpretation of the right to religious freedom. The Chief Justice did not strongly or unequivocally endorse a witness' right to religious freedom. She stated that a witness, who for sincere religious reasons wishes to wear the *niqab* while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring her to remove the *niqab* outweigh the deleterious effects of doing so.[114]

Despite this qualification of the accommodation of the *niqabi* woman in the courtroom, the significance of the Court's acknowledgment of the right to wear the *niqab* in the courtroom must be noted. It is a positive aspect of this majority opinion that the Chief Justice asserted that secularism did not mean the rejection of religion without justification. It remains promising that the Chief Justice rejected the notion that the courtroom is 'neutral' and so cannot accommodate religion. Significantly, the majority endorsed the accommodation of religious practices in Canadian Courts. The majority opinion is arguably a pragmatic resolution premised on a commitment to reasonable accommodation of religious practices. It is also significant that the majority recognized the presumptive right of a woman to wear the *niqab*, albeit a rather thin presumptive right that has to be balanced against the rights of the accused and the right to a fair trial.

The Court attempted to reach a fair balance with regard to the scope of the state to regulate religion, the meaning of secularism and state neutrality and how they implicate public policy. The decision is promising for its recognition of the jurisprudential tradition of a broad and generous interpretation of religious freedom stating categorically that:

> 'A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and

113 ibid 28.
114 ibid 3.

lead to wrongful conviction. What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial. The *Canadian Charter of Rights and Freedoms*, which protects both freedom of religion and trial fairness, demands no less.'[115]

In conclusion, what equality seeking religious minority claimants can draw from the majority opinion is arguably a mixed message. On the one hand, the assertion of religious difference in the public sphere – in particular, the courtroom, is recognized. On the other hand, this recognition is simultaneously undermined by the Court's reluctance to apply an unequivocal contextual analysis to questions of sexual assault of women of religious minorities. Moreover, the Court appeared not to consider fully the scope and content of the guarantee of religious freedom. Noting the importance of inclusion and democratic participation, the Court quickly moved away from a categorical assertion of how such competing interests are to be balanced and reasonably accommodated. Arguably, the Court was, and perhaps understandably so, unwilling to get bogged down by the facts and details of this particular case. Perhaps the Court was unwilling to lay down rigid and inflexible rules so that it might retain the possibility of a contextualized response depending on the specific facts and circumstances of future cases that might come before it. Nevertheless, the Court failed to view this case as an opportunity to clarify these issues for future claimants, specifically gendered, racialised, minority claimants.

B. A Clash of Civilizations: No Place for Multiculturalism in the Courtroom?

In a striking concurrence, Justice Louis LeBel also dismissed NS' appeal and held that the case should be sent back to the preliminary inquiry judge. Although he reached the same conclusion as the majority, his reasoning is in sharp contrast to that of the Chief Justice. LeBel and Rothstein JJ's opinion can be characterized as a 'clash of civilizations approach'[116] to reasonable accommodation of religious difference and to multiculturalism. Drawing on a Canadian constitutional nationalism, this opinion positions it and multiculturalism as mutually exclusive. According to Justice LeBel, the *NS* appeal aptly illustrated 'the tension and changes caused by the rapid evolution of contemporary Ca-

115 ibid.

116 See Samuel P Huntington, 'The Clash of Civilizations?' *Foreign Affairs* (Summer 1993) 22 online: Harvard Kennedy School of Government <http://www.hks.harvard.edu/fs/pnorris/Acrobat/Huntington_Clash.pdf> accessed 6 February 2015. Huntington identified the conflict between Western and non-Western civilizations as 'the latest phase in the evolution of conflict in the modern world'. This conflict would not only take place between states, but also in states' reception and tolerance of minority cultures. Huntington's clash thesis has however been severely critiqued; see eg, Jonathan Fox, 'Ethnic Minorities and the Clash of Civilizations: A Quantitative Analysis of Huntington's Thesis' (2002) 32 Brit J Pol S 415; Shirleen T Hunter, *The Future of Islam and the West: Clash of Civilizations or Peaceful Coexistence?* (Praeger 1998); Frederick S Tipson, 'Culture Clash-ification: A Verse to Huntington's Curse' (1997) 76 Foreign Affairs 166; Bruce Russett, John R Oneal & Michalene Cox, 'Clash of Civilizations, or Realism and Liberalism Déjà Vu? Some Evidence' (2000) 37 J Peace Research 583.

nadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices.'[117] Calling for a definitive ruling, LeBel J noted the diversity of contemporary Canadian society but reiterated that the common foundation must be premised on core Canadian constitutional values.[118] Referring to the *Oakes* test, he noted that Dickson CJ reaffirmed these core democratic principles in the approach to justifying limitation on rights.[119]

According to LeBel, '[t]hose common values are the ones that allowed Canada to develop and live as a diverse society. They preserve a public space where all will be welcome as they are, but where some core common values will facilitate the interaction between all members of society.'[120] In his seminal opinion on the interpretation and application of s 1 of the *Charter* in *Oakes*, Dickson CJ adverted to the presence and importance of these common values.[121] In his comment on the meaning of the words 'free and democratic society' in s 1 of the *Charter*, LeBel emphasized that these values were the source of the constitutional rights guaranteed by the *Charter*:

> 'The will to maintain an independent and open justice system in which the interests and the dignity of all are taken into consideration remains a key aspect of the traditions grounding this democratic society. The religious neutrality of the state and of its institutions, including the courts and the justice system, protects the life and the growth of a public space open to all regardless of their beliefs, disbeliefs and unbeliefs. Religions are voices among others in the public space, which includes the courts.'[122]

Invoking 'the living tree doctrine'[123] that has guided Canadian constitutional evolution, LeBel J insisted that while acknowledging the importance of multiculturalism in growing Canadian diversity, the recognition of multiculturalism must be fixed *within* the framework of Canadian democracy and core Canadian values.[124] Throughout his concurrence, Mr Justice LeBel invoked common Canadian values; the *Oakes* test principles, as well as the living tree doctrine of Canadian constitutionalism to argue against allowing NS to wear a *niqab* while testifying.

Pitting multiculturalism against Canadian values, LeBel J concluded that the recognition of Canada's multicultural diversity must be measured against what he noted are 'the roots of contemporary democratic society.'[125] Further, he asserted that an independent open justice system is a fundamental aspect of this tradition grounding Canadian democracy. While he acknowledged that there are several exceptions to the openness of the courts, he noted that these are indeed exceptions,[126] and that the general rule remained that courts are to be open to the public, as the public is entitled to know what goes on in

117 *NS* – SCC (n 5) 59.
118 ibid 71-72.
119 ibid.
120 ibid 71.
121 *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200.
122 *NS* – SCC (n 5) 73.
123 The 'living tree doctrine' was first articulated by Lord Sankey, LC of the Judicial Committee of the Privy Council, in the seminal *Edwards v Canada (Attorney General)*, [1930] AC 124, 1929 UKPC 86.
124 *NS* – SCC (n 5) 72.
125 ibid 71-72, LeBel and Rothstein JJ, concurring.
126 ibid 75.

the courts. Thus he made the connection with the broader constitutional perspective whereby he equated the trial with communication with the public at large, emphasizing that this principle must be asserted irrespective of religion, gender or origin.[127] The *niqab* prevents and hinders this process of communication inherent in the trial process and therefore he stated that a clear rule that *niqabs* may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of the process as one of communication. Such a rule would also be consistent with the tradition that justice is public and open to all in our democratic society. According to him, this rule should apply at all stages of the criminal trial, at the preliminary inquiry as well as at the trial itself. In his opinion, therefore, the matter should be remitted as proposed by the Chief Justice to the preliminary inquiry judge.

For Mr Justice LeBel, the only reasonable way of adequately balancing equality and religious freedom with state secularism and neutrality in the public sphere was to unequivocally establish the certain and predictable rule that there was no place for the *niqab* in the courtroom. First, LeBel J considered the conflict between religious rights and the criminal justice process noting – as did the Chief Justice – that the two rights engaged here are the right to religious freedom and the right to a fair trial. He did not question the witnesses' sincerity of religious belief, and noted the need to protect victims of sexual assault during a criminal trial. However, he argued that the accused's right to make full answer and defense would be negatively impacted by a defense that is unduly and improperly constrained, and therefore he asserted that NS must be asked to remove her *niqab* while giving evidence at the preliminary inquiry and at trial.[128]

Another area of disagreement between the Chief Justice and LeBel J arose on the question of whether or not to allow the witness to wear a *niqab* while testifying should depend on the nature or importance of the evidence. LeBel J found the criteria for consideration proposed by the Chief Justice to be problematic for a number of reasons. His first objection was that the proposition would lead to unnecessary complications in adding a layer of unnecessary complexity to an already complex trial process. In addition, LeBel J opined that such a condition would add greater uncertainty to what is already a constantly evolving and dynamic situation given the nature of the trial process itself. Therefore, in his view, the only solution was to have a clear unequivocal rule, keeping in mind the impact on the rights of the defense, and in the context of the underlying values of the Canadian justice system, that 'the wearing of a *niqab* should not be allowed.'[129]

This approach to the accommodation of minority religious practices underscores the limits of an uncritical policy of multiculturalism and, concomitantly, the limits on the recognition of difference. Justice LeBel stated that:

> 'A clear rule that *niqabs* may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication. It would also be consistent with the tradition that justice is public and open to all in our democratic society. This rule should apply at all stages of the criminal trial, at the preliminary inquiry as well as at the trial itself.'[130]

127 ibid 76.
128 ibid 58.
129 ibid 59.
130 ibid 78.

The yardstick against which minority beliefs will be measured in this view will continue to be the beliefs of the Canadian majority population as indeed, this concurring opinion sends a troubling message to minorities regarding the accommodation of their religious beliefs.

Insisting on a blanket ban on *niqabs* from the courtroom is a misreading of the long tradition of Canadian jurisprudence that emphasizes a reasonable accommodation approach to competing rights, one that advocates a minimal impairment and a robust justification to limit the right to religious freedom. It appears that LeBel J did not fully consider in his analysis the place of religious belief, sincerity of belief, or the scope and content of religious freedom. Such an understanding narrows the scope of the s 2(*a*) guarantee and is premised on a notion of neutrality and secularism that leaves little room for the accommodation of difference. Moreover, arguably, LeBel J did not fully consider what the impact might be on thus excluding racialised minority women from participation in the criminal justice system.

The concurring opinion's emphasis on 'Canadian values' is worrisome for its rejection of the accommodation of difference. The concurrence imposes and reifies an 'us and them' binary, setting up Samuel Huntington's uncritical clash of civilizations approach, and valorizing uncritically 'Canadian Values.' At the same time, it deploys stereotypes of Muslim women's dress to connote practices and values that are inherently un-Canadian. Such an uncritical understanding cannot result in a meaningful, purposive, contextual legal response to exclusion and difference.

C. A Contextual Approach

In stark contrast to the majority and concurring opinions, Justice Rosalie Abella made an impassioned plea for listening to the voice of the excluded and marginalized. She questioned the impossibility of the choice presented to women like NS when faced with having to choose between their religious beliefs and participating in the criminal justice system. Abella J noted the controversy over the context of this case, and the questions it raises with regard to the mandatory aspect of wearing the *niqab*, and the issue of whether it is a symbol of oppression and marginalization. For Justice Abella, the question to be determined was 'whether [the wearing of a *niqab*] enhances multiculturalism or whether it demeans it.'[131] Abella J pointed out that these are complex issues, but that it was not within the mandate of the Supreme Court to inquire into the meaning or mandatory religious nature of the *niqab*. Rather, the only question that the Court must consider is, '[w]here identity is not an issue, should a witness' sincerely held religious belief that a *niqab* must be worn in a courtroom, yield to an accused's ability to see her face. In other words, is the harm to the accused's fair trial rights in not being able to see a witnesses' entire face, greater than the harm to that witnesses' religious rights?'[132]

Throughout her dissent, Abella J insisted on bringing the context back to the analysis of balancing these rights and interests. In contrast to the de-contextualized analysis of LeBel (and to an extent of the Chief Justice), Abella J considered the impact on *niqabi* women of denying the right to religious freedom. Arguably this was not fully considered

131 ibid 80.
132 ibid.

by the majority either. Abella J noted that a number of interests are engaged when a witness is not permitted to wear her *niqab* while testifying. Most importantly, she is prevented from being able to act in accordance with her religious beliefs. Religious requirements are experienced as 'obligatory and non-optional', that is, as not providing a genuine choice to the religious believer.[133]

Justice Abella's opinion recognized the impact such a requirement will likely have on the exclusion of 'Others' and signals her awareness of the notion of meaningful choice. Furthermore, as Abella J underscored, a witness who is not permitted to wear her *niqab* while testifying is prevented from being able to act in accordance with her religious beliefs. This has the effect of forcing her to choose between her religious beliefs and her ability to participate in the justice system. As a result, complainants who sincerely believe that their religion requires them to wear the *niqab* in public, may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else's trial. Where the witness is the accused, she will be unable to give evidence in her own defense. The majority's conclusion that being unable to see the witness' face is acceptable from a fair trial perspective if the evidence is 'uncontested', essentially means that sexual assault complainants whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a *niqab*, which may not be a meaningful choice at all.

Abella J was mindful of the lack of meaningful choice here for women of faith. Effectively, they are being asked to choose between their religious rights and the right to seek justice. In no uncertain terms she argues that '[c]reating a judicial environment where victims are further inhibited by being asked to choose between their religious rights and their right to seek justice undermines the public perception of fairness not only of the trial, but of the justice system itself.'[134] Insisting on a contextual approach to balancing these competing interests and rights she asserted that, '[t]he order requiring a witness to remove her *niqab* must also be understood in the context of a complainant alleging sexual assault.'[135]

Where *niqab*-wearing women are not permitted to testify while wearing the *niqab*, it will result in excluding them from participating in the criminal justice system. For Justice Abella, the risk of requiring a witness to remove her *niqab* while testifying means it is likely that she will not testify or bring charges in the first place. In other words, insisting that the witness remove her *niqab* while testifying will likely have a chilling effect, discouraging women from bringing complaints forward. It is also likely that in cases where she is the accused, she will not be able to testify in her own defense. For Abella J this was 'a significantly more harmful consequence than the accused not being able to see a witness' whole face.'[136] Abella J was emphatic that, '[u]nless the witness' face is directly relevant to the case, such as where her identity is in issue, she should not be required to remove her *niqab*.'[137] She concluded that, 'the harmful effects of requiring a witness to remove her *niqab*, with the result that she will likely not testify, bring charges in the first

133 ibid 93.
134 ibid 95.
135 ibid.
136 ibid 108.
137 ibid 731.

place, or, if she is the accused, be unable to testify in her own defense, is a significantly more harmful consequence than not being able to see a witness' whole face.'[138]

Justice Abella strenuously rejected the majority opinion with regard to sincerity and strength. The notion of testing not just sincerity of belief but now also strength is a disturbing aspect of the majority opinion. Abella J voiced her dissent thus,

> 'In the context of a witness wearing the *niqab*, I see very little realistic possibility for accommodation. With great respect, however, I disagree with the majority that the "strength" of a witness' belief, while not relevant in assessing the witness' *prima facie* religious claim, *is* nonetheless somehow relevant when balancing that claim against trial fairness. It is unclear to me how a claimant's "strength" of belief – particularly given the highly subjective and imprecise nature of the freedom of religion analysis – affects the protection a claimant should be afforded under the *Charter*.'[139]

In undertaking a contextual analysis, she noted that preventing a *niqab* wearing woman from testifying would be like hanging a sign over the courtroom door saying 'Religious minorities not welcome.' Justice Abella's interpretive framework is arguably most compatible with the recognition of the rights of minority religious claimants. She employed a framework that considered context, sincerely held belief, meaningful choice, inclusion and exclusion.

III. Future Implications

The majority opinion demonstrated a certain pragmatism in balancing competing rights claims. As the majority clearly noted, the endorsement of a categorical rule gives insufficient consideration to the delicate balancing act that must take place whenever a Court is called upon to reconcile competing rights and freedoms. Recognizing the necessity of contextualizing rights and freedoms, the majority opinion underscored the public importance of including *niqabi* women. The majority noted that laws do and must change with time and insisted on the need to question myths especially in the context of sexual assault. And yet, the majority opinion did not go far enough in endorsing *niqabi* women's choice, agency, or freedom of religion. The majority's conclusion failed to pay sufficient attention to issues at the core of this case, particularly the social and political vulnerability of *niqabi* women in its judicial response.

The *NS* decision, examined alongside recent jurisprudence on religious freedom, raises a number of important questions for the direction of the Court: what are the implications for future religious freedom claims by minority claimants? In what direction is the Court headed regarding the scope of religious freedom? Does the majority opinion now add an extra burden on the claimant to prove strength of belief in order to demonstrate sincerity of belief? The latter concern is expressed by Abella J's remarks on sincerity versus strength. The unintended consequence of such a line of inquiry as raised by the majority might be that the court would now be entangled in the very business of making religious assessments that *Amselem* explicitly wanted to avoid.

138 ibid 108.
139 ibid 85.

As a positive aspect, however, in her balancing of deleterious effects and salutary effects, the Chief Justice did note the broader societal harms of not permitting a woman to wear the *niqab*. She acknowledged that this might likely have the effect of excluding women of faith from the criminal justice system. She stressed the need for accommodating sincerely held beliefs but if no accommodation is possible, then the religious right will have to be limited. However, there seems to be a lack of a rigorous minimal impairment analysis. It is unclear what the majority decision portends for minority religious groups seeking exemptions from the application of secular rules. Does it mean that the court will not be sympathetic to such claims and that the threshold for the claimant is now set impossibly high? In this case again it seems as if the court is not sympathetic to the claims of religious minorities seeking exemption from the application of general rules. It is unclear whether a similarly accommodating approach would arise in all circumstances.

While the decision is a step forward for a notional reasonable accommodation of cultural and religious practice in Canadian courts, the same might not be true in all circumstances where wearing the *niqab* is at issue. It is unclear what the combined effect of *Hutterian Brethren* and *NS* will be for any future constitutional challenge of laws banning the *niqab*, including and not limited to legislative initiatives such as Quebec's Bill 60 or the *Charter of Secular Values*. The most immediate impact of the Supreme Court decision in *NS* has been seen on NS herself as the case was sent back to the preliminary inquiry judge. Diligently applying the rules and test as set out by the majority in the Supreme Court, it is not surprising that the preliminary judge ruled that NS had to remove her *niqab* while testifying. It is precisely this result that makes the majority decision in *NS* so troubling for the future of minority rights claims, in particular religious freedom claims. It portends a chilly climate for those racialised, minority women who approach the justice system.

The latest episode in this six year-long saga speaks to the impact of this Supreme Court decision. On 24 April 2013, the matter went back to the Ontario Superior Court and Judge Weisman once again considered whether NS should be allowed to wear her *niqab* while testifying, ruled that she must take it off for the trial. Following the directions of the SCC in *R v NS*, Judge Weisman applied the *Dagenais/Mentuck* framework to balance the competing rights of NS' constitutionally-protected right to freedom of religion, and the accused's equally-protected right to trial fairness.'[140] Weisman J accordingly framed his inquiry in terms of the four questions as set out by McLachlin CJ as per the *Dagenais/Mentuck* framework, asking the four questions noted by the Supreme Court. In answer to the first question, namely, whether requiring the witness to remove her *niqab* while testifying with her right to religious freedom, Judge Wiseman found that, indeed wearing the *niqab* while testifying in court was a sincere religious belief held by NS.

Following the Supreme Court's directions that 'whether the ability to observe a witness' face impacts upon trial fairness in any particular case depends on whether the evidence is uncontested and credibility assessment is not in issue,'[141] Judge Weisman concluded that

> '[T]o permit N.S. to testify at this preliminary inquiry with her face obscured by the *niqab* will impair defense counsels' ability to assess her demeanor, as well as the

140 *NS – voir dire* (n 10) 2.
141 ibid 5.

trier of fact's ability to assess her credibility. This will cause real and substantial risk to the accused's rights under ss. 7 and 11(*d*) of the Charter to a fair hearing including the right to make full answer and defense.'[142]

Having found that in fact permitting NS to wear her *niqab* while testifying would cause real and substantial risk to the accused's rights to a fair hearing, Judge Weisman considered whether it was possible to accommodate NS' religious belief. He found that no accommodation or alternative measures are possible. 'I conclude that no accommodation or alternative measures are possible. The *niqab* is either worn at or removed for the preliminary inquiry. There is no middle ground.'[143] This conclusion resonates with the opinion of LeBel and Rothstein JJ that it was an all or nothing position, that there is no middle ground or accommodation possible in this case and that the choice was between wearing the *niqab* and not testifying. Thus the dangers of this approach have been amply demonstrated by Judge Weisman's conclusion. There was no reasonable alternative as understood by Judge Weisman.

Finally, the Judge went on to consider in considering the fourth and last question, whether 'the salutary effects of requiring N.S. to remove her *niqab* outweigh the deleterious effects of doing so.'[144] The judge concluded that the deleterious effects of allowing NS to testify wearing a *niqab* far outweighed the salutary effects of permitting her to testify with it on. His conclusion was based on weighing both the individual impact on NS herself being forced to remove her *niqab* while testifying, with the broader societal impact on permitting her to wear the *niqab* while testifying as well as the individual impact on the accused's right to a free and fair hearing as well as the possible serious consequences of life imprisonment possible were they to be found guilty of the alleged crimes. For the judge these considerations were of far greater consequence than harm to NS' religious freedom in having to testify without the *niqab*. Although he acknowledged the possibility that this might deter *niqabi* women in similar cases from bringing their case forward, he concluded that, weighing the salutary and deleterious effects as per the framework set out by the Supreme Court, there was no choice but to insist on NS testifying without her *niqab*. Ultimately, NS had to choose between upholding her religious beliefs and testifying. Consequently, she compromised the wearing of her *niqab*, only for her case to be rejected.

Conclusion

An important aspect of the *NS* case relates to reasonable accommodation. The crucial factor here is the institutional setting in which it takes place. As per the majority decision, the reconciliation of the rights of the accused and claimant will sometimes enable the wearing of the *niqab* in court, something that was not necessarily clear in law and general courtroom practice before the *NS* case. In contrast to the concurring opinion that would entirely bar the *niqab* from the court room, the majority decision could be seen as a judicial endorsement of reasonable accommodation in Canada's courtrooms, in certain circumstances, however narrow. The dissenting opinion is the only judicial voice, through

142 ibid.
143 ibid 6.
144 ibid.

a contextual analysis, to consider fully the scope and content of the right to religious freedom and the justifications for its limitation to endorse an understanding of institutional accommodation of difference.

In conclusion, this decision with its three rather different opinions, illustrates the continuing tension in Canadian doctrinal understandings of religious freedom. There is uncertainty about both the scope and limits of secularism and state neutrality, as well as disagreement with regard to the conceptual and normative content of religious freedom itself. As *NS* reveals, the Court is divided as to the values and priorities implicated in the protection of religious freedom and the implications for institutional secularism and democratic freedoms. And yet, this decision, with all of its differences, remains consistent with religious freedom doctrine to the extent that it reaffirms the judicial consensus that in balancing values of multiculturalism, the protection of minority rights, and equality concerns, the limits of religious freedom will inevitably be set by countervailing public interests and values as asserted in *Multani*, *Bruker*, and *Hutterian Brethren*. In this way, *NS* is not a radical or surprising departure from traditional understandings of the scope, content and limits of the guarantee of religious freedom, but rather should be seen as a continuation of the negotiation of balancing minority values within a particular liberal understanding and conception of normative religion.

In the final analysis, it appears that the Supreme Court's decision in *NS* does not send a strong enough signal to affirm the rights of racialised, minority women. With the legislative developments and discussions of secularism in Canada regarding questions of conspicuous religious symbols, religious neutrality and state secularism, questions of reasonable accommodation of religious minorities will likely continue. Muslim women, so it seems, will continue to be viewed as a potential 'threat' to the secular, democratic consensus of liberal democracy.

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