

## DIFFERENCE AND INCLUSION: REFRAMING REASONABLE ACCOMMODATION

### A. Introduction

Multiculturalism is a body of thought in political philosophy about the proper way for a state to respond to cultural and religious diversity.<sup>1</sup> Multiculturalism policy may be characterised as the state's response to diversity; the constitutional, legal and policy framework by which minority rights are recognized and accommodated. Reasonable Accommodation is the framework within which the state accommodates minority difference by balancing competing rights; it is a critical aspect of the implementation of Multiculturalism policy. Controversy swirls over multiculturalism and the accommodation of difference as the tension between religious freedom and non-discrimination principles is becoming increasingly acute. There is a perceived tension between women's equality rights on the one hand and multiculturalism and religious freedom on the other, where minorities seek exemption from rules of general application.<sup>2</sup> Popular discourse reflects anxiety about the 'illiberal' practices that Muslim immigrants in particular, bring to Canada's liberal democracy.<sup>3</sup> Focusing on 'cultural' practices such as honour killing, veiling, and polygamy, public policy increasingly reflects popular discourse as the "crisis of multiculturalism" is articulated around the need to counter gender inequality within racialised minority groups.<sup>4</sup>

Official multiculturalism focuses on what differences the state should accommodate and the extent to which they should be accommodated.<sup>5</sup> Reasonable Accommodation is "itself a tool of governmental intervention to manage diversity-related conflict..."<sup>6</sup> Through governmentality regulated by particular understandings of gender normativities, Muslim women in particular, are portrayed as unassimilable and as threats to democratic values, to gender equality, to the nation and its legitimate citizens. Simultaneously, they are perceived as victims, lacking agency and

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<sup>1</sup> Sarah Song, "Multiculturalism", *The Stanford Encyclopedia of Philosophy*, ed Edward N. Zalta (Spring 2014), URL = <<http://plato.stanford.edu/archives/spr2014/entries/multiculturalism/>>.

<sup>2</sup> Leti Volpp, "Feminism Versus Multiculturalism" (2001) 101:5 *Columbia Law Review* 1181 at 1181. See also, Vrinda Narain, "Critical Multiculturalism" in Beverley Baines et al, eds, *Feminist Constitutionalism: Global Perspectives* (Cambridge: Cambridge University Press, 2012).

<sup>3</sup> Will Kymlicka, "The New Debate on Minority Rights (and Postscript)" in Anthony Simon Laden and David Owen, eds, *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007) 25 at 54–55 [Kymlicka, 2007].

<sup>4</sup> Volpp, *supra* note 2. See also, *Discover Canada: The Rights and Responsibilities of Citizenship* (Citizenship and Immigration Canada 2011) at 9 [*Citizenship Guide*]; Bill 60, *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, Quebec, 2014 [*Quebec Charter of Values*]; *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29 [BPA]; 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) 60 at 87.

<sup>5</sup> Young, *supra* note 4 at 84–86.

<sup>6</sup> Sirma Bilge, "Reading the Racial Subtext of the Québécois Accommodation Controversy: An Analytics of Racialized Governmentality" (2013) 40:1 *Politikon* 157 at 158 [Bilge, 2013].

therefore in need of saving.<sup>7</sup> This representation of Muslim women animates the politics of Reasonable Accommodation. The premise of Reasonable Accommodation continues unquestioned and it remains for ‘us’ to decide which aspects of ‘their’ difference must be accommodated. Consequently, structural racism and systemic discrimination are unchallenged and practices that are accommodated are seen as exceptions to a relatively unquestioned state multiculturalism, reinforcing its legitimacy of governance.

Will Kymlicka notes that multiculturalism in Canada has moved from a focus on ethnicity and race to a focus on religious difference and we see the rise in minority justice claims for the accommodation of religious difference.<sup>8</sup> In the first part of this paper, I draw from Sirma Bilge’s insights to discuss how governmentality and state multiculturalism have erased race in the discussions around Reasonable Accommodation.<sup>9</sup> I then consider key cases and legislative and policy initiatives that illustrate the rhetoric of multiculturalism, and together with it, the limits of the reasonable accommodation framework, focusing on the Supreme Court’s decision in *R v. NS*, and the *Zero Tolerance For Barbaric Cultural Practices Act*, among others, to better understand judicial responses and legislative initiatives that regulate racialized minority women. Beyond questioning which differences should be accommodated and which not, I consider the discursive construction of the identity of accommodated subjects and how they are framed as citizens, to underscore the particular vulnerability of racialized, (often) immigrant, minority women.<sup>10</sup> I end by elaborating new strategies for responding to minority rights claims. I come to this issue by drawing from the insights of critical multiculturalism, critical race feminist theory, and postcolonial feminist theory. My modest aim here is to contribute to the dialogue on the inclusion of racialized women: I argue that it is imperative to formulate a policy of critical multiculturalism and reframe the accommodation of difference to strengthen the commitment to substantive equality and minority rights. This paper is inscribed in the context of the current debates on the limits of religious freedom and the accommodation of group difference in Canada.

## **B. Theoretical Framework**

### ***I. Multiculturalism***

Official multiculturalism is a method of governmentality where it serves “as a collection of cultural categories for ruling or administering, and communities claim their ‘representational

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<sup>7</sup> Sherene 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 at 7, 10, 15.

<sup>8</sup> Will Kymlicka, “The Three Lives of Multiculturalism” in Shibao Guo & Lloyd Wong, eds, *Revisiting Multiculturalism in Canada* (Toronto: Springer, 2015) 17 at 26–27 [Kymlicka, 2015].

<sup>9</sup> Bilge, 2013, *supra* note 6; Sirma Bilge, “Mapping Quebecois Sexual Nationalism in Times of ‘Crisis of Reasonable Accommodation’” (2012) 33:3 *J of Intercultural Stud* 303–18 [Bilge, 2012].

<sup>10</sup> Bilge, 2013, *supra* note 6 at 157.

status' as direct emanations of social ontologies."<sup>11</sup> The fluidity of identities and the reality of multiple allegiances are not adequately acknowledged and at the heart of such a policy is a notion of culture that is static, leading to what Anne Phillips calls, "a falsely homogenizing reification."<sup>12</sup> The refusal to problematize culture has contributed to a reification of stereotypical views of racialised minority groups. It is premised on an understanding of culture that homogenizes and essentialises groups and rejects diversity within groups.<sup>13</sup> Members of these groups are seen as profoundly different in their practices, beliefs and values, leading critics of multiculturalism to claim that minority groups are inherently opposed to the values of the Canadian liberal democratic state, thereby posing a threat to political stability.<sup>14</sup>

This understanding of cultural difference animating official multiculturalism is premised on dichotomies such as East/West, modernity/tradition, and culture/feminism. It raises troubling issues of representation, agency, and authenticity. It also raises issues of democratic participation and the inclusion of minorities within minorities: the paradox of multicultural vulnerability. While invariably the focus of multiculturalism policies, minority racialised women are excluded from the articulation of group interests and the definition of group identity, both by the state and by community leaders.

A policy based on cultural difference focuses on what aspects of difference are permissible by the state and what are not, such as the *kirpan*, *niqab*, or the *get*. Public debate on the limits of accommodation displaces structural problems onto issues of culture, tending to ignore structural issues of racism, poverty, unemployment, poor education, and access to justice while magnifying issues related to religion and culture. Public discourse continues to be preoccupied with stereotypical images of racialised immigrant women and issues of cultural difference. This preoccupation forms the context for the critique that critical multiculturalism aims to provide. Critical multiculturalism moves away from a simplistic focus on culture and instead argues for a multiculturalism that is located in the intersections of inequality, culture, and power. My intervention is premised on the distinction between a multiculturalism policy based on cultural difference and one that is designed as a response to structural inequality. A politics of structural difference focuses on issues of exclusion and inclusion, examining how norms and standards, rather than perpetuating systemic inequality, can be revised to recognize minority difference.

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<sup>11</sup> Himani Bannerji, *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism, and Gender* (Toronto: Canadian Scholars' Press, 2000) at 6.

<sup>12</sup> Anne Phillips, *Multiculturalism without Culture* (Princeton, NJ: Princeton University Press, 2007) at 14.

<sup>13</sup> *Ibid* at 162–63.

<sup>14</sup> *Ibid* at 3–24; Azizah Y Al Hibri, "Is Western Patriarchal Feminism Good for Third World/ Minority Women?" in Joshua Cohen, Matthew Howard, and Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1997) 41 at 41.

While it is important to accommodate cultural difference by recognizing distinct cultures and practices that can respond to a dominant nationalism, in responding to minority claims, it is critical to challenge systemic inequality by paying attention to structural inequalities. So doing exposes the structural dimensions of processes of exploitation, marginalization, and normalization that keep groups in subordinate positions. Moving away from oppositional understandings of women's substantive equality and minority rights, Iris Young has argued that an effective policy of multiculturalism must focus not just on cultural differences but also on exclusions that result from structural inequalities.<sup>15</sup> Rejecting a reductive binary between recognition and redistribution, as Nancy Fraser argues, it is imperative to reconceptualise the justice of minority claims where both recognition and redistribution inform the notion of justice.<sup>16</sup> Maleiha Malik articulates such an understanding, which she terms progressive multiculturalism, that is concerned with the context of minority women who demand not just recognition but full inclusion in social, economic, and political institutions. This understanding of multiculturalism can better respond to the challenge of 'cultural racism', focusing on confronting racism and discrimination as barriers to inclusive equality.<sup>17</sup>

## ***II. Reasonable Accommodation***

Reasonable accommodation is one of the ways in which negotiation is framed within the Canadian multiculturalism framework and it has become a tool of governmentality for the management and governance of religious diversity.<sup>18</sup> The framework of multiculturalism and reasonable accommodation determines the extent to which diversity is accepted and sets limits to its accommodation.<sup>19</sup> As Martha Minow writes, "constitutional and legal frameworks affect the room available for expressing and maintaining cultural difference, while also arranging how conflicts between mainstream and minority groups will be identified, addressed and resolved. Public policy and legal responses to immigrants are closely tied to a nation's stance towards multiculturalism, neutrality about religion and race, gender equality and universal notions of human rights."<sup>20</sup> It is therefore important to understand how "...aspects of law and policy reinforce the substantive beliefs and values of the mainstream and how much cultural diversity is

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<sup>15</sup> Young, *supra* note 4.

<sup>16</sup> Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 *New Left Review* 68; N. Fraser and A. Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (London: Verso, 2003).

<sup>17</sup> Maleiha Malik, "Progressive Multiculturalism" (2010) 17 *Intl J Minority & Group Rts* 447 at 458.

<sup>18</sup> Lori Beaman, "Introduction: Exploring Reasonable Accommodation" in Lori Beaman, ed, *Reasonable Accommodation* (Vancouver: UBC Press, 2012) 1 at 5, 3, 9 [Beaman, 2012].

<sup>19</sup> *bid* at 3.

<sup>20</sup> Richard A. Schweder, Martha Minow & Hazel Rose Markus, "Engaging Cultural Differences" in Richard A. Schweder, Martha Minow and Hazel Rose Markus, eds, *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York: Russell Sage Foundation, 2002) 1 at 12 [*Engaging Differences*].

permissible.”<sup>21</sup> Which diversities are constructed and accommodated in this contested terrain and in “the struggles over accommodation?”<sup>22</sup>

Bilge argues that reasonable accommodation is seen commonly to be about religion and secularism not race, effectively resulting in an erasure of race.<sup>23</sup> Although race is embedded in the contested terrain of reasonable accommodation, the debate around it has been “largely cast as raceless.”<sup>24</sup> The discourse of accommodation focuses on minorities’ religious differences as problems that must be accommodated. Himani Bannerji asserts that it is necessary to question the rhetoric of official multiculturalism and its discursive uses that obscure the power relations and its “politicized understanding of cultural representation.”<sup>25</sup> Reasonable accommodation discourse is embedded in governmentality of equity and diversity policies rather than demonstrating the political will to engage minorities and challenge institutionalised racism. A multiculturalism policy where identities are state-imposed based on stereotypical, essentialised understandings of minority cultures, results in a notion of governmentality and state control that “eludes notions of equality.”<sup>26</sup>

The reasonable accommodation framework is an integral part of the state’s response to difference, yet the legitimizing function of inequality it sustains has not been adequately interrogated. Invariably, minority practices are measured against unquestioned mainstream norms that set the limits of accommodation; difference becomes the special exception while mainstream culture is normalised.<sup>27</sup> As will be seen in the jurisprudence and legislative initiatives below, the focus of reasonable accommodation is on the limits of toleration rather than a consideration of minority women’s rights. In public discourse, reasonable accommodation has come to be understood as synonymous with the accommodation of religious diversity.<sup>28</sup> While race is erased from the accommodation discourse, whiteness as privilege is also unnamed. The discourse around reasonable accommodation normalizes race privilege and fails adequately to consider inherent power relations and hierarchies in the accommodation of difference. It obfuscates issues of structural inequality, institutionalised racism, and the construction of difference, and reifies the

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<sup>21</sup> *bid* at 2.

<sup>22</sup> Bilge, 2013, *supra* note 6 at 158.

<sup>23</sup> *Ibid* at 159.

<sup>24</sup> *Ibid* at 158.

<sup>25</sup> Bannerji, *supra* note 11 at 5.

<sup>26</sup> 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 at 447 [Beaman, 2011].

<sup>27</sup> *Ibid* at 447–51, 449. See e.g., Catharine MacKinnon, “Difference and Domination: On Sex Discrimination” in Elizabeth Hackett & Sally Haslanger, eds, *Theorizing Feminisms: A Reader* (Oxford: Oxford University Press, 2005).

<sup>28</sup> Beaman, 2012, *supra* note 18 at 3.

terms of the debate into an us versus them binary.<sup>29</sup> Unless we insert race into the analysis, it will remain little more than a way to sustain the racial status quo. Power hierarchies will remain intact.<sup>30</sup>

## C. Cases and Legislative Initiatives

### I. Cases

In recent years, recognizing Canada's growing diversity, the Supreme Court has underscored the centrality of equality, multiculturalism, and the accommodation of difference in responding to minority claimants seeking exemption from mainstream norms.<sup>31</sup> Constitutional scholar Sujit Choudhry notes that the Supreme Court of Canada has developed a strong religious freedom jurisprudence, setting out the constitutional doctrine around section 2(a). The Court adapted the reasonable accommodation framework, an idea originally developed under human rights codes in the employment context, incorporating it into *Charter* adjudication.<sup>32</sup> It has elaborated on the framework of reasonable accommodation in the context of balancing the right to religious freedom with other rights, notably equality rights.<sup>33</sup> Early Supreme Court decisions taken under section 2(a) had held that "the duty to accommodate was part of the minimal impairment analysis" under s. 1.<sup>34</sup> However, in later decisions the Court limited the reach of duty to accommodate in its narrow legal sense to individual administrative decisions and did not extend it to laws of general application.<sup>35</sup> Invariably, section 2(a) challenges also concern section 15, as indeed section 15 challenges invoke section 2(a) where religion is the basis of discrimination. Outside the courtroom, all of these claims became seen as reasonable accommodation claims for exemptions from laws, and for accommodation in existing institutional structures.<sup>36</sup>

#### A. Reasonable Accommodation in Jurisprudence

*Big M*, which concerned Sunday closing laws, was the first religious freedom case decided by the Supreme Court under the *Charter*. Significantly, the Court invoked multiculturalism to interpret religious freedom, "The power to compel, on religious grounds, the universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians recognized in s. 27 of the *Charter*." In *Syndicat*

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<sup>29</sup> Beaman, 2011, *supra* note 26 at 443–45.

<sup>30</sup> Bilge, 2013, *supra* note 6 at 158.

<sup>31</sup> Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the *Canadian Charter of Rights and Freedoms*" (2002) 41:3 *Brandeis LJ* 2.

<sup>32</sup> Sujit Choudhry, "Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation" (2013) 50 *Osgoode Hall LJ* 575 at 585, 586 [Choudhry, 2013].

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at 586.

<sup>35</sup> *Ibid.* See also *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 67–69, [2009] 2 SCR 567 [*Hutterian Brethren*].

<sup>36</sup> Choudhry, *supra* note 32..

*Northcrest v Amselem*, the Supreme Court of Canada specified that the state could not rule on religious dogma and accommodated Mr. Amselem's construction of a succah.<sup>37</sup> In *Multani*, the Court upheld the right of a Sikh boy to carry a *kirpan*, invoking multiculturalism to send a powerful message of equality between all religions. Multiculturalism, reasonable accommodation and religious freedom were highlighted as fundamental organizing principles of Canadian life.<sup>38</sup> In particular, Justice Charron, writing for the majority of the Court, held that the duty to accommodate religious difference to the point of undue burden is "helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual."<sup>39</sup> Note that the Court divided, however, on the relevance of reasonable accommodation to the section 1 Oakes analysis. In her dissent, Justice Abella affirmed the relevance of reasonable accommodation to the question of whether a school board's decision to prohibit the *kirpan* is reasonable in the administrative law sense, but denied its usefulness to the Oakes minimal impairment test, as the latter concerned not only the individual but the societal impact of the law.<sup>40</sup>

In *Bruker v Marcovitz*, the Court emphasized that Canada's growing diversity had resulted in the judicial recognition of multiculturalism and respect for difference.<sup>41</sup> As Justice Abella explained, while claims for exemptions and accommodation cannot always be privileged and must be balanced with public interest, 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.<sup>42</sup> Moving away from the understanding of reasonable accommodation articulated in earlier jurisprudence, in *Alberta v Hutterian Brethren of Wilson Colony*, the Court limited religious freedom, signalling a greater deference to secular, government objectives.<sup>43</sup> Indeed, a majority of the Court held the reasonable accommodation analysis inappropriate where laws of general application are concerned. Seizing on Justice Abella's dissent on this point in *Multani*, Chief Justice McLachlin held that "the question the court must answer is whether the Charter infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned."<sup>44</sup> More recently, in *R. v. NS*, concerning the right of a Muslim woman to wear a *niqab* while testifying, the Supreme Court displayed tensions in understandings of multiculturalism and the accommodation of religious difference.<sup>45</sup> The issue of the *niqab* raised questions at the intersection of gender equality,

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<sup>37</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50, [2004] 2 SCR 551 [*Amselem*].

<sup>38</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 71, 78, [2006] 1 SCR 256 [*Multani*].

<sup>39</sup> *Ibid* at para 53.

<sup>40</sup> *Ibid* at paras 129, 131-32.

<sup>41</sup> *Bruker v Marcovitz* 2007 SCC 54 at para 70, [2007] 3 SCR 607 [*Bruker*] at 615, para 1.

<sup>42</sup> *Ibid* at para 2.

<sup>43</sup> *Hutterian Brethren* at paras 66-71.

<sup>44</sup> *Ibid* at para 69.

<sup>45</sup> *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 [*NS*].

religious freedom, and multiculturalism and tested the limits of the accommodation. Interestingly however, in *Loyola* where the Court considered a challenge to the constitutionality of the state imposing secular instruction on a religious school, the Court upheld the school's right to religious freedom, despite state policy objectives of spreading the message of tolerance, equal respect and multiculturalism.

In framing the notion of reasonable accommodation to adjudicate religious freedom cases, the Supreme Court has developed a constitutional analysis premised on minority rights, equality and multiculturalism, folding these considerations into the s.1 analysis of proportionality and minimal impairment. Choudhry argues that although *Amselem*, *Lafontaine*, *Bruker*, *Multani* and *Hutterian* may not all have been decided or analysed using the framework of reasonable accommodation in its narrow legal sense, it was at the root of these decisions.<sup>46</sup> The SCC's decisions on religious freedom and reasonable accommodation are part of the context of the increasingly sharp rhetoric and public debate about reasonable accommodation and the limits of toleration. Choudhry suggests that the Court is acutely aware of this context and how it is impacted by, and impacts, jurisprudence.<sup>47</sup> The SCC's decisions were not well received in Quebec. In particular, *Multani* provoked public outcry, resulting in the creation of the Consultation Commission on Accommodation Practices related to Cultural Differences, commonly known as the Bouchard-Taylor Commission.<sup>48</sup>

Choudhry argues that this awareness of the sensitive political and social context and the differences between Quebec and the rest of Canada, has led the Supreme Court to craft the idea of state neutrality as a way of mediating the tension between the two.<sup>49</sup> State neutrality has been used to resist claims for reasonable accommodation in many instances.<sup>50</sup> In *Amselem*, state neutrality was the basis for the dissenting judges', including Justices LeBel and Deschamps, refusal to incorporate the notion of reasonable accommodation into their analysis. Justice LeBel's dissent in *Lafontaine*, refusing to accept any claim for state action to support religious practice, was based on a concern to maintain the state's religious neutrality. In *Multani*, arguably, the principle of neutrality formed the basis of Justice Deschamps' reluctance to invoke the *Charter* to resolve an administrative law issue.<sup>51</sup> In *Bruker*, neutrality was arguably the premise of Justice Deschamps' dissent and her refusal to engage in adjudicating a religious matter, the Jewish *get*.<sup>52</sup> In the majority opinion in *Hutterian Brethren*, the Court relied on the notion of state neutrality to argue against the accommodation of religious practices. Most recently, in *Saguenay*, Chief Justice

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<sup>46</sup> Choudhry, *supra* note 32 at 585.

<sup>47</sup> *Ibid* at 588.

<sup>48</sup> *Ibid* at 586.

<sup>49</sup> *Ibid* at 580.

<sup>50</sup> *Ibid* at 592.

<sup>51</sup> *Ibid* at 588.

<sup>52</sup> *Bruker*, *supra* note 19 paras 102, 122-132; Choudhry, 2013, *supra* note 32 at 600.

McLachlin, for the majority, affirmed the importance of the principle of state neutrality in a decision barring Catholic prayer at municipal council meetings. Interestingly, the Court invoked multiculturalism as a means to justify the neutrality principle: “a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person’s freedom and dignity.”<sup>53</sup> Choudhry argues that the politics around reasonable accommodation in Quebec is embedded in the context of Quebec nationalism, nation building and identity formation.<sup>54</sup> Extending this argument, I suggest that *NS* and the *Barbaric Practices Act* reflect Canadian anxieties about the illiberal practices of immigrant racialised minorities and the limits of toleration.<sup>55</sup>

### B. R v. NS

In *NS*, 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.<sup>56</sup> The Court identified the two *Charter* rights engaged: the witness’ religious freedom and the accused’s fair trial rights. My focus here is on those aspects of the Supreme Court’s decision that relate to religious freedom, multiculturalism, and reasonable accommodation. There were three opinions in *NS*, the majority, the concurrence and the dissent. I consider each of these as they exemplify different approaches to multiculturalism and the accommodation of difference.

Chief Justice McLachlin writing the majority opinion on behalf of herself, Deschamps, Fish and Cromwell JJ, attempted to reach a fair balance with regard to religious freedom, gender justice, secularism and neutrality and how they implicate public policy. Careful to avoid an all-or-nothing judicial response, the CJ considered the positions of the concurrence and the dissent on the wearing of a *niqab* in court: that the witness must never be permitted to wear a *niqab* in court and the contrasting view that she must always be permitted to do so, and rejected both absolute positions. This decision is promising for its recognition of the jurisprudential tradition of a broad and generous interpretation of religious freedom and the accommodation of difference, but also raises certain concerns for future minority claimants.

McLachlin CJ rejected the view that the courtrooms are neutral spaces that should never accommodate personal religious beliefs as being ‘inconsistent with Canadian jurisprudence,’ and that to ‘remove religions from the courtroom was not in the Canadian tradition.’<sup>57</sup> She asserted

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<sup>53</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 74, [2015] 2 SCR 3 [*Saguenay*].

<sup>54</sup> Choudhry, *supra* note 32 at 590.

<sup>55</sup> Kymlicka, 2007, *supra* note 3 at 54.

<sup>56</sup> *NS*, *supra* note 45.

<sup>57</sup> *Ibid* at paras 53, 102, 122–32.

that “such a position would limit religious rights where there is no countervailing right and hence no reason to limit them ...”<sup>58</sup> Significantly, the majority noted the broader societal harms, particularly in the context of sexual assault complaints, if women were forced to remove their *niqab* to testify and drew attention to the extent to which sexual assault crimes remain under reported.<sup>59</sup>

What equality seeking religious minority claimants can draw from the majority opinion is a mixed message. On the one hand, the assertion of religious difference in the public sphere, the courtroom, is recognized. On the other hand, the majority did not fully consider the impact on the witness’ religious freedom if she were forced to testify without her *niqab*. Despite promising discussions of reasonable accommodation, the Chief Justice did not strongly endorse a witness’ right to religious freedom, deciding that a witness could testify wearing her *niqab* unless this unjustifiably impinged on the accused’s fair trial rights; and only in cases where there is uncontested evidence.<sup>60</sup> Yet, in a sexual assault case, it is unlikely that the evidence will be uncontested, effectively meaning that a witness would not be allowed to testify while wearing her *niqab*. Despite this qualification of the accommodation of *niqabi* women, the Court’s acknowledgment of the presumptive right to wear the *niqab* in the courtroom is noteworthy. From the perspective of religious minority claimants, it is important that the majority rejected the argument that accommodating religion in the courtroom would compromise state neutrality and the neutrality of public institutions.<sup>61</sup> Most important, the majority reaffirmed the place of reasonable accommodation of religious difference in Canadian jurisprudence and reiterated that secularism did not mean the rejection of religion without justification.

In contrast, LeBel and Rothstein JJ’s concurring opinion may be characterized as a ‘clash of civilizations approach’ to the accommodation of religious difference and multiculturalism.<sup>62</sup> It reflects an uncritical notion of state multiculturalism, secularism and neutrality, where the *niqab* was framed as a threat to gender equality and democracy, reflecting Andreassen and Lettinga’s argument 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’ –

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<sup>58</sup> *Ibid* at para 51.

<sup>59</sup> *Ibid* at para 37.

<sup>60</sup> *Ibid* at para 28.

<sup>61</sup> *Ibid* at para 51.

<sup>62</sup> 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](http://www.hks.harvard.edu/fs/pnorris/ Acrobat/Huntington_Clash.pdf)> accessed 6 February 2015.

results in exclusionary and racialised understandings of the national community.”<sup>63</sup> According to Justice LeBel, the *NS* appeal illustrated “the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices.”<sup>64</sup> Drawing on a Canadian constitutional nationalism, he positioned it in opposition to multiculturalism. He insisted that the recognition of multiculturalism must be fixed within the framework of Canadian democracy and core Canadian values, which included the neutrality of the state and its public institutions and he concluded that it was imperative to establish an absolute prohibition of the *niqab* in the courtroom.<sup>65</sup> This emphasis on “Canadian values” imposes an “us and them” binary, deploying stereotypes of racialised minority women whose practices and values are inherently un-Canadian. Arguably, this is a departure from Canadian jurisprudence that emphasizes a reasonable accommodation approach to competing rights and requires minimal impairment and a stringent justification to limit religious freedom. LeBel J’s understanding narrows the scope of the religious freedom guarantee by premising it on a notion of neutrality and secularism that leaves little room for the accommodation of difference.

In her dissent, Abella J considered the impact of denying the right to religious freedom on *niqabi* women, underscoring that 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.<sup>66</sup> Noting the absence of meaningful choice, she questioned the either/or dichotomy presented to women like *NS*, having to choose between their religious beliefs and participating in the criminal justice system. Justice Abella argued that insisting that the witness remove her *niqab* while testifying would have a chilling effect, discouraging women from registering complaints, resulting in a lack of confidence on the part of minorities in the justice system.<sup>67</sup> Pursuing a contextual approach to balancing competing 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.”<sup>68</sup> She concluded that in the context of this case, the witness must be permitted to wear the *niqab* while testifying.

*NS* reveals the divisions within the Court regarding the scope and limits of religious freedom and multiculturalism and the implications for institutional secularism and democratic freedoms. It reaffirms the judicial consensus that in balancing competing rights, the limits of accommodation will be set by countervailing public interests and values as asserted in *Multani*,

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<sup>63</sup> Rikke Andreassen & Doutje Lettinga, “Veiled Debates: Gender and Gender Equality in European National Narratives” in Sieglinde Rosenberger and Birgit Sauer, eds, *Politics, Religion and Gender: Framing and Regulating the Veil* (London: Routledge, 2012) 17 at 17, 21, 31.

<sup>64</sup> *NS*, *supra* note 45 at para 59.

<sup>65</sup> *Ibid* at para 72.

<sup>66</sup> *Ibid* at para 93.

<sup>67</sup> *Ibid* at para 95.

<sup>68</sup> *Ibid*.

*Bruker*, and *Hutterian Brethren*. It remains unclear what the effect of *NS* will be for future constitutional challenges. The most immediate impact of this decision has been seen on *NS* herself, as the case was sent back to the preliminary inquiry judge. Applying the test set out by the majority in *NS*, unsurprisingly, the preliminary judge in his decision of April 24, 2013, ruled that *NS* had to remove her *niqab* while testifying. Ultimately, *NS* had to choose between upholding her religious beliefs and testifying. She compromised the wearing of her *niqab*, only for her case to be rejected.<sup>69</sup> For future claims asserting difference, 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. Indeed all three opinions characterise the *niqab* as a problem that the courts must contend with through a careful balancing of religious freedom, multiculturalism, gender equality, and state neutrality; that the right of minorities to "integrate" must be contextualised within certain core principles and Canadian values. As Lori Beaman notes, *NS* reveals how concepts like accommodation maintain unequal power relations, moving those who are 'Other' further away from equality. The decisions differ however in their approach to balancing equality, religious freedom and multiculturalism concerns, in their conceptualization of state neutrality and secularism and the premise for the accommodation of difference. The judicial response to religious freedom and reasonable accommodation seems to be premised on a dialectical tension between difference and belonging. As Faisal Bhabha notes, the development of religious freedom doctrine "...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."<sup>70</sup>

### *C. R v. Ishaq*

Multiculturalism is cast uniquely as a minority matter, aimed at addressing short-term issues related to the transition from immigrant to citizen. Citizenship acquisition is rendered increasingly difficult and available only after successful integration.<sup>71</sup> The *Ishaq* case demonstrates the link between managing religious difference and democratic citizenship.<sup>72</sup> *Ishaq* concerned the refusal of a woman to remove her *niqab* during the citizenship oath ceremony since removing her veil was unnecessary for the purposes of identity or security. *Ishaq* challenged the governmental policy on two grounds: religious freedom under s. 2(a) and equality under s.15(1). The policy in question was section 6.5 of the Manual of the CIC's Operational Bulletin 359 which provides: "[c]andidates wearing face covering are required to remove their face coverings for the

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<sup>69</sup> Alyshah Hasham, "Sex-assault case that led to Supreme Court *niqab* ruling ends abruptly", *Toronto Star* (17 July 2014), online: <[https://www.thestar.com/news/gta/2014/07/17/sexassault\\_case\\_that\\_led\\_to\\_supreme\\_court\\_niqab\\_ruling\\_ends\\_abruptly.html](https://www.thestar.com/news/gta/2014/07/17/sexassault_case_that_led_to_supreme_court_niqab_ruling_ends_abruptly.html)>.

<sup>70</sup> 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 at 131.

<sup>71</sup> Elke Winter, "Becoming Canadian: Making Sense of Recent Changes to Citizenship Rules" (January 2014) 44 *IRPP Study* 20.

<sup>72</sup> *R v Ishaq*, 2015 FCA 156, [2015] 4 RCF [*Ishaq*].

oath taking portion of the ceremony. If they do not, they will not receive their citizenship certificates and will have to attend a different ceremony. If they again do not comply, then their application for citizenship will be ended.”<sup>73</sup>

Her refusal was tied to her religious beliefs:

My religious beliefs would compel me to refuse to take off my veil in the context of a citizenship oath ceremony, and I firmly believe that based on existing policies, I would therefore be denied Canadian citizenship. I feel that the governmental policy regarding veils at citizenship oath ceremonies is a personal attack on me, my identity as a Muslim woman and my religious beliefs.<sup>74</sup>

The Minister of Citizenship and Immigration, Jason Kenney, declared:

[The citizenship oath] is an act of public witness, you are standing up in front of your fellow citizens making a solemn commitment to be loyal to the country, and I just think it’s not possible to do that with your face covered and it also, I think, just undermines the whole approach that we are trying to do through citizenship, which is to make people fully members of our community. I do not know how you can do that from behind a kind of a mask.<sup>75</sup>

Ishaq claimed that although the policy was purported to be about allowing for visual confirmation of the oath taking ceremony, in fact, based on the Minister’s comments in the media, the intended target was Muslim women such as herself who wear a face covering.<sup>76</sup> The Court noted this, “Indeed the intention that it be mandatory for people to remove face coverings is also evident in public statements about the new directive when it was introduced. The Minister at the time said during a CBC interview on December 12, 2011, that the Policy was adopted after one of his colleagues told him about a citizenship ceremony where four women had been wearing niqabs.”<sup>77</sup> The Federal Court ruled in favour of Ishaq and permitted her to wear a niqab during the citizenship swearing in ceremony. However, the Court did not discuss *Charter* issues, adjudicating her claim on formal legal issues. In response, the Federal government filed an appeal against the decision, which was withdrawn by the Liberal administration in 2015, soon after its election.

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<sup>73</sup> *Ibid* at para 5.

<sup>74</sup> *Ibid* at para 6.

<sup>75</sup> *Ibid* at para 49.

<sup>76</sup> *Ibid* at para 22

<sup>77</sup> *Ibid* at para 49.

## *II. Legislative Initiatives*

### *A. The Zero Tolerance for Barbaric Cultural Practices Act*

The *Zero Tolerance for Barbaric Cultural Practices Act* (hereinafter the *BPA*), is an intervention aimed at ending violence against women, honour killings and polygamy in racialized communities among others. The *Zero Tolerance for Barbaric Cultural Practices Act*,<sup>78</sup> is “An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts”. Part 1 amends the *Immigration and Refugee Protection Act* to specify that a permanent resident or foreign national is inadmissible on grounds of practising polygamy in Canada. Part 2 amends the *Civil Marriage Act* to provide for the legal requirements for a free and enlightened consent to marriage and for any previous marriage to be dissolved or declared null before a new marriage is contracted. Part 3 amends the *Criminal Code* to (a) clarify that it is an offence for an officiant to knowingly solemnize a marriage in contravention of federal law; (b) provide that it is an offence to celebrate, aid or participate in a marriage rite or ceremony knowing that one of the persons being married is doing so against their will or is under the age of 16 years; (c) provide that it is an offence to remove a child from Canada with the intention that an act be committed outside Canada that, if it were committed in Canada, would constitute the offence of celebrating, aiding or participating in a marriage rite or ceremony knowing that the child is doing so against their will or is under the age of 16 years; (d) provide that a judge may order a person to enter into a recognizance with conditions to keep the peace and be of good behaviour for the purpose of preventing the person from committing an offence relating to the marriage of a person against their will or the marriage of a person under the age of 16 years or relating to the removal of a child from Canada with the intention of committing an act that, if it were committed in Canada, would be such an offence; and (e) provide that the defence of provocation is restricted to circumstances in which the victim engaged in conduct that would constitute an indictable offence under the *Criminal Code* that is punishable by five years or more in prison. Finally, the enactment also makes consequential amendments to other *Acts*.

Community organizations, like the South Asian Legal Clinic of Ontario, condemned the Bill for targeting racialized communities by locating violence within these communities. They alleged that the government had made unnecessary changes in the laws, without providing any data or factual basis but rather appealing to the fear of the Other in Canadian society premised on stereotypes about certain communities. Such laws criminalizing entire communities or families will have a chilling effect on women within these communities, preventing them from reporting any violence and precluding their participation in the justice system. Furthermore, they noted, “In that regard, immigrant and racialized women face additional challenges because of their race and/or their

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<sup>78</sup> *BPA*, *supra* note 4.

precarious immigration status. Contrary to what the government has stated, the proposed legislative changes will not result in greater protection for women victims of domestic violence, but will have the opposite effect.”<sup>79</sup> The Canadian Bar Association also criticised the *Act*, “We do say that the title is divisive and misleading, and oversimplifies factors that contribute to discrimination and violence against women and children.”<sup>80</sup>

### B. The Quebec Charter of Values

Quebec’s *Charter of Values*, Bill 60, highlights the preoccupation with cultural difference. It was introduced by the Parti Québécois in 2013 to respond to the simmering controversy in Quebec over the limits of accommodation, but died on paper in March 2014 with the defeat of the PQ by the Quebec Liberal Party. Its avowed purpose was to set out a *Charter* affirming the values of state secularism, religious neutrality and gender equality and to provide a framework for accommodation requests. The Bill proposed a prohibition on religious symbols, including crosses over a certain size, the *kippa*, *hijab* and *niqab*. Significantly, it permitted the display of the cross in the National Assembly, arguing it was part of Quebec’s cultural heritage rather than simply a religious symbol. The Bill limited the right of women wearing the *niqab* to receive or deliver services from a range of public institutions when it would limit communication, hinder identification of the wearer, or present security risks. It provided that requests for accommodation would be considered giving particular weight to principles of gender equality and state neutrality with respect to religion, as well considerations of cost. The *Charter* focused on the status of women within minority groups, rather than addressing their systemic disadvantage both inside and outside the group.<sup>81</sup> Clearly targeting Muslim women, this legislative initiative was intended to regulate them as symbols of the threat posed to Quebec identity and core values of secularism, religious neutrality and gender equality.<sup>82</sup>

### *C. Bill 62: Act to Foster Adherence to State Religious Neutrality*

Bill 62, the *Act to foster adherence to State religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies*, was passed into law by the Québec legislature on October 18, 2017. Continuing the preoccupation with

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<sup>79</sup> Press release of the South Asian Legal Clinic of Ontario <http://www.salc.on.ca/sw00nb4.html>  
SALCO’s 2013 report, “Who if when to marry: A report on incidents of Forced Marriages in Ontario” <http://www.salc.on.ca/FINALBILLS7STATEMENT%20updated%20nov%2018.pdf> SALCO.

<sup>80</sup> CBC News, “‘Barbaric Cultural Practices’ bill inflammatory, says Canadian Bar Associations”, *CBC* (5 May 2015), online: <<http://www.cbc.ca/news/canada/ottawa/barbaric-cultural-practices-bill-inflammatory-says-canadian-bar-association-1.3061317>>.

<sup>81</sup> Ghada Mahrouse, “‘Reasonable Accommodation’ in Québec: The Limits of Participation and Dialogue” (2010) 52:1 *Race & Class* 85.

<sup>82</sup> *Ibid.*

stereotypical notions of cultural difference and the status of women in racialised minority groups, the Bill was introduced by the Liberal Party of Quebec in June 2015 following a campaign promise.<sup>83</sup> Largely understood as a Liberal response to the Parti Québécois's *Charter of Values*, the Act's stated purpose is to reinforce state religious neutrality.<sup>84</sup> The Act thus requires that all public services, including education, daycare, health care, and municipal transportation services, be rendered with one's face uncovered.<sup>85</sup> Although the Act requires that public servants "neither favour nor hinder a person because of the person's religious affiliation or non-affiliation,"<sup>86</sup> it also requires that persons receiving public services do so with their faces uncovered.<sup>87</sup> In this respect, the Act goes further than the failed *Charter of Values*, which would have only required niqab-wearing service users to uncover their faces when communication, identification, or security was at issue. The Bill passed 66 to 51, with all but Liberal members voting against the Bill. Notably, the conservative Coalition Avenir Québec and separatist Parti Québécois parties opposed the Bill, stating that it did not go far enough.<sup>88</sup> Indeed, whereas the *Charter of Values* prohibited all religious symbols, the Bill only prohibits face-coverings, compounding the well-founded perception that the Act targets Muslims women. Muslim organizations, civil rights groups and legislators and the Premier [of Ontario](#) and the Premier of Alberta have come out strongly against Bill 62. Yet, the Premier of Québec, Philippe Couillard has defended the law, saying it is necessary for reasons related to communication, identification and security.<sup>89</sup>

The Act is expected to have significant distributive consequences for niqab-wearing women, denying them access to health care, education as well as to public employment and childcare services. As LEAF noted in reaction to the passing of the Act, "[w]omen continue to be the primary care givers in many families, and therefore have a disproportionate need for childcare services." The Act will thus further entrench the gendered-nature of poverty.<sup>90</sup> As Charles Taylor and others have stated in an op-ed, this law unnecessarily restricts women from covering their faces even when not required for reasons of security or identification. The legislation thus

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<sup>83</sup> Graeme Hamilton, "Shades of PQ's charter of values as Quebec Liberals move to ban niqabs in public service", *National Post* (10 June 2015), online: <<http://nationalpost.com/opinion/graeme-hamilton-shades-of-pqs-charter-of-values-as-quebec-liberals-move-to-ban-niqabs-in-public-service>>.

<sup>84</sup> Bill 62, *Act to foster adherence to State religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies*, 1st Sess, 41st Leg, Québec, 2017 (assented to 18 October 2017), SQ 2017, c 19.

<sup>85</sup> *Ibid*, ss 2, 8.

<sup>86</sup> *Ibid*, s 4.

<sup>87</sup> *Ibid*, s 10.

<sup>88</sup> Philip Authier, "Public services should be given and received with an open face': Couillard", *Montreal Gazette* (20 October 2017), online: <<http://montrealgazette.com/news/quebec/despite-controversy-bill-62-on-state-neutrality-sails-into-law-in-a-badly-split-vote>>.

<sup>89</sup> Monique Scotti, "Bill 62: Could Ottawa really do anything about Québec's face-veil ban?", *Global News* (19 October 2017), online: <<https://globalnews.ca/news/3813986/bill-62-quebec-trudeau-intervene/>>

<sup>90</sup> Women's Legal Education and Action Fund, "LEAF opposes the Québec government's "Religious Neutrality" Bill, Bill 62", online: <<http://www.leaf.ca/leaf-opposes-the-quebec-governments-religious-neutrality-bill-bill-62/>>.

contradicts its stated goals of religious neutrality and “interculturalism” by hampering a woman's ability to “interact with other citizens.”<sup>91</sup>

While the Bill provides for the possibility of religious accommodation, it places the burden of seeking accommodation on the individual affected. Most problematically, exact rules on how the ban should be enforced will not be available until detailed regulations are published in June 2018. Until then ad-hoc determinations and accommodations are bound to multiply the opportunities for discrimination.

### C. Discover Canada: The Rights and Responsibilities of Citizenship

Another interesting example is the *Canadian Citizenship Guide*, “The Equality of Women and Men” which notes the need to integrate new citizens, emphasizing common Canadian values and exhorting new citizens to adapt themselves to these values.<sup>92</sup> It provides, “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.”<sup>93</sup> The premise is that new immigrants need citizenship training to understand the importance of adhering to ‘core Canadian’ values of gender equality, democracy and the rule of law.<sup>94</sup> It draws on stereotypical dichotomies between East/ West, illiberal/liberal, irrational/rational as well as tradition/ modernity to suggest that these values will be unfamiliar to immigrants.<sup>95</sup>

These legislative initiatives reflect the persistence of colonial and Orientalist discourses whereby the liberal state justifies its intervention to save ‘native’ women from their barbaric, outdated customs.<sup>96</sup> The debate is framed around the limits of toleration; the notion that ‘we’ are willing to tolerate some cultural differences but not others.<sup>97</sup> Certain norms and cultural practices are accepted as the yardstick against which ‘other’ cultural values must be measured.<sup>98</sup> Displacing structural problems onto issues of culture, the *BPA* and other legislative and policy initiatives are premised on an inflexible understanding of secularism and neutrality and on an essentialised

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<sup>91</sup> Jocelyn Maclure & Charles Taylor, “Revenir au texte et à l’esprit du projet de loi 62”, *La Press* (20 October 2017), online: <[http://plus.lapresse.ca/screens/220acce6-62c2-4173-8db9-9db9a52c5dd4%7C\\_0.html](http://plus.lapresse.ca/screens/220acce6-62c2-4173-8db9-9db9a52c5dd4%7C_0.html)>.

<sup>92</sup> *Citizenship Guide*, *supra* note 4.

<sup>93</sup> *Ibid* at 9.

<sup>94</sup> *Ibid*.

<sup>95</sup> Phillips, *supra* note 12 at 23.

<sup>96</sup> See, Edward W Said, *Orientalism* (New York: Vintage, 1979); Gayatri Spivak, “Can the Subaltern Speak?” in Cary Nelson and Lawrence Grossberg, eds, *Marxism and the Interpretation of Culture* (Basingstoke: MacMillan Education, 1988) 271.

<sup>97</sup> Mahrouse, *supra* note 81 at 86.

<sup>98</sup> *Ibid* at 87.

notion of culture. The *BPA* does not respond to structural inequalities, neglecting to provide increased number of domestic violence shelters, aid for women survivors of violence and their children, or improved social services, for minority women. Rather than forwarding women's equality, agency and free choice and promoting their inclusion, the *BPA* disempowers them and moves them further away from equality. It reinforces patriarchal structures of authority over minority women, forcing them to turn inwards in response to mainstream hostility. Thus legislative initiatives like the *BPA* contribute to reinforcing the Otherness of minority, racialized women under the pretext of secularism and gender equality.<sup>99</sup>

#### D. Discussion

As seen in the jurisprudence and legislative initiatives discussed above, the framework of reasonable accommodation does not enable a challenge to the institutional and structural aspects of discrimination, but instead simply allows for claiming an exception. It is critical to pose a challenge to this top-down notion of governmentality where multiculturalism policy is seen as a way to manage and regulate diversity, rather than a bottom-up version that seeks to build theory and policy based on realities of daily life experiences in order to refocus multiculturalism and reframe reasonable accommodation as a tool to respond to such inequalities and to challenge the limits of this framework.<sup>100</sup> Scholars like Natasha Bakht argue for a pragmatic engagement with the framework of reasonable accommodation. While acknowledging the limits of this model, Bakht notes that the conceptual framework of reasonable accommodation has allowed for an expansion of the recognition of minority difference. She argues that engaging with this framework would prevent a rollback of, and backlash against, minority rights.<sup>101</sup> While such a framework of resolving conflicts might be an effective short term strategy yielding certain tangible short-term benefits, it may not be as effective in forwarding substantive equality in the long term.<sup>102</sup>

Beaman emphasises that the framework of multiculturalism influences what is deemed reasonable, what is to be accommodated, what notion of diversity is central to this framework and the limits of acceptable difference.<sup>103</sup> The understanding of multiculturalism defines and shapes the nature of reasonable accommodation together with particular notions of state secularism, neutrality and gender equality that are implicated in this discourse.<sup>104</sup> Certain types of ideal citizens are

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<sup>99</sup> *Ibid* at 178.

<sup>100</sup> *Ibid* at 162.

<sup>101</sup> Natasha Bakht, "Veiled Objections: Facing Public Opposition to the Niqab" in Beaman, *supra* note 18 at 70.

<sup>102</sup> Vrinda Narain, "The Place of the Niqab in the Courtroom" (2015) 9:1 ICL Journal 41 at 50; Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433.

<sup>103</sup> Beaman, 2012, *supra* note 18 at 4.

<sup>104</sup> *Ibid*.

constructed while others are cast out.<sup>105</sup> Two main arguments against minority religious accommodation are gender equality and state secularism and neutrality.<sup>106</sup> Recent debates illustrate how gender equality and secularism have become pivotal to the construction of national identity.<sup>107</sup> Gerard Bouchard asserts that the fundamental organizing values of the Quebecois nation are gender equality and secularism, which might be inconsistent with immigrants' values.<sup>108</sup> This understanding manifests itself beyond the Quebec context as demonstrated by federal legislative initiatives such as the *BPA* and results in “discursive affirmations of the nation’s core values”—underscoring its links with particular gender normativities.<sup>109</sup> It reifies binaries of feminism versus multiculturalism, secularism versus religion, which reinforce racialised governmentality and set the limits of accommodation.<sup>110</sup> Reasonable accommodation becomes a “device for constructing and ascribing political subjectivities and agencies for those who are seen as legitimate and full citizens and others who are peripheral to this in many senses.”<sup>111</sup>

Bilge counters dominant readings of reasonable accommodation, moving the focus away from whether or not minority religious practices should be accommodated, to an analysis of the debate on this issue, how the terms of the debate construct racialised immigrant women, how links are drawn between national belonging and proper subjects of citizenship along a racialized lines, and the way in which cultural signifiers are used “as a racializing code.”<sup>112</sup> Erasing race, the discussion turns to values and similarities and more important, difference, whereby racialised others can be legitimately excluded from the national family.<sup>113</sup> We see this view reflected in *NS* and legislative initiatives such as the *BPA*, where ‘racial significance is attached to cultural signifiers’ such as the *niqab*.<sup>114</sup>

The casting out of Muslims has become central to the Canadian national imaginary where Muslim women are depicted as threats to secularism, gender equality and democracy.<sup>115</sup> The state is constructed as upholding gender equality and secularism.<sup>116</sup> Secularism is reconstructed as signifying modernity, in contrast to religious practices that subordinate minority women, yet its

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<sup>105</sup> Bilge, 2013, *supra* note 6 at 167.

<sup>106</sup> Bilge, 2012, *supra* note 9 at 310; Malik, *supra* note 17 at 459.

<sup>107</sup> Bilge, 2012, *supra* note 9 at 303; Bilge, 2013, *supra* note 6 at 175.

<sup>108</sup> Gerard Bouchard, “What is Interculturalism?” (2011) 56:2 McGill LJ 437 at 448, 454.

<sup>109</sup> Bilge, 2013, *supra* note 6 at 175.

<sup>110</sup> *Ibid.*

<sup>111</sup> Bannetji, *supra* note 11 at 6.

<sup>112</sup> Bilge, 2013, *supra* note 6 at 176.

<sup>113</sup> *Ibid* at 160.

<sup>114</sup> *Ibid* at 161.

<sup>115</sup> Bilge, 2012, *supra* note 9 at 305.

<sup>116</sup> Andreassen & Lettinga, *supra* note 63 at 21.

impact on their greater regulation leading to their disempowerment, remains unacknowledged.<sup>117</sup> A dogmatic conception of secularism is used to justify the regulation of minority women in the name of equality and neutrality and is supported by some mainstream feminists as a universal model of women's freedom.<sup>118</sup> Mainstream feminists' support of legislative initiatives such as the *BPA*, results in the continued positioning of minority women as the 'Other'. In this liberal understanding of minority difference, gender is essentialised, culture is homogenised and stereotypical understandings of racialised women are reaffirmed; they are constructed and re-constructed as oppressed, without agency. Liberal feminists, like Susan Okin and Martha Nussbaum, argue that "granting rights to protect minority or traditional cultural practices jeopardizes the struggle for gender equality because minority and traditional culture so often engage in domination of women."<sup>119</sup> They assert that, given a choice, minority racialised women would choose liberal rights traditions over their cultural traditions.<sup>120</sup> Leti Volpp notes that they suggest minority women ought to shed their culture and assimilate into mainstream culture to realise their equality rights.<sup>121</sup> They are marginalized in any appeals to universal sisterhood, where inclusion in the feminist project, requires shedding their 'Other (izing)' culture.<sup>122</sup> This stance of mainstream feminists in the (mis)understanding that they are forwarding the cause of gender equality and inclusiveness by supporting legislative restrictions, neither empowers minority women nor recognizes their agency. On the contrary, it reinforces state control and a victim narrative that justifies intervention.

Turning to the responsibility of communities themselves, it is important to acknowledge the complex location of minority women along multiple axes of discrimination and the reality of oppressive patriarchal customs which impact their response to gender discrimination within their own communities as well as to state gendered, racialised systems of discrimination. The state's response cannot be increased legislative regulation, but rather, must focus on inclusion and democratic participation of women within racialised communities.<sup>123</sup> It is essential to work within minority cultures, rather than to abandon women to patriarchal structures of authority by accepting conservative (religious) leaders as the true representatives of the group.<sup>124</sup> Community leaders themselves must be called to account for supporting oppressive customs and practices that

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<sup>117</sup> Razack, *supra* note 7 at 19–22. See e.g. Volpp, *supra* note 2 at 1181.

<sup>118</sup> See Susan Moller Okin, "Is Multiculturalism Bad for Women?" (1997) *Boston Review*, online: Bostonreview.net <<http://bostonreview.net>>.

<sup>119</sup> Martha Minow, "About Women, about Culture: About Them, About Us" in *Engaging Differences*, *supra* note 20, 252 at 255.

<sup>120</sup> *Ibid.*

<sup>121</sup> Volpp, *supra* note 2 at 1201.

<sup>122</sup> *Ibid.*

<sup>123</sup> Bannerji, *supra* note 11 at 179.

<sup>124</sup> *Ibid* at 64.

disadvantage women.<sup>125</sup> The discursive construction of Muslim women as victims without agency complicates Muslim women's own challenge to gender disadvantage and patriarchy within the community.<sup>126</sup> Women within racialized minority communities have difficulty in pursuing social change for fear of reinforcing a racist agenda.<sup>127</sup> Community leaders discourage them from critically examining inequalities within the community in order to maintain group solidarity in the face of mainstream hostility.<sup>128</sup> As Sheema Khan, founder and former President of the Council of American Islamic Relations-Canada, now called the National Council of Canadian Muslims, writes, "Some will be critical of the airing of "dirty laundry" during difficult times for Muslims. Yet meaningful discussions about the treatment of women have been avoided for far too long. To what end? What we don't need is another lecture about the dress and behaviour of the "ideal" Muslim woman. Instead, we need to hear more about men taking responsibility for their actions, and treating women as equal human beings."<sup>129</sup>

Drawing from the insights of Austin Sarat, I suggest that there is a dialectical tension between difference and conformity that is reflected in the contests over reasonable accommodation.<sup>130</sup> This dialectic is at the core of the debates over the accommodation of difference, where gender equality is positioned at one end and seemingly irreconcilable assertions to difference at the other. Often the tension between women's rights and multiculturalism is expressed as a sharp binary and invariably minority women are presented with an either/or choice between culture and rights. We need to avoid an all or nothing choice for women between cultural autonomy on one hand and access to education, employment and political participation on the other.<sup>131</sup> Focusing on the redistribution of social, economic and political power to excluded groups, multiculturalism must be reconceptualised as an anti-racist policy that challenges culturalism faced by minorities.<sup>132</sup>

Critical multiculturalism and reframing reasonable accommodation challenge liberal feminists' reductive analysis of minority racialised women's needs, while also seeking to build cross-cultural feminist coalitions. Challenging the epistemic privilege of mainstream feminists, it

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<sup>125</sup> *Ibid* at 47–52, 55.

<sup>126</sup> Razack, *supra* note 7 at 6, 29.

<sup>127</sup> *Ibid* at 6.

<sup>128</sup> *Ibid* at 6–7.

<sup>129</sup> Sheema Khan, "Muslim men must learn to treat women as equals", *The Globe and Mail* (6 January 2016).

<sup>130</sup> Austin Sarat, "The Micropolitics of Identity-Difference: Recognition and Accommodation in Everyday Life" in *Engaging Differences*, *supra* note 20 at 396, 398.

<sup>131</sup> Malik, *supra* note 17 at 464.

<sup>132</sup> *Ibid* at 458.

is important to centre marginalized communities of women in our analysis of social justice.<sup>133</sup> Critical race feminist scholars Mari Matsuda and Adrien Wing note that racialised minority immigrant women have overlapping identities and experience discrimination along multiple axes.<sup>134</sup> Intersectionality enables focusing on overlapping identities, highlighting the fact that discrimination occurs along multiple systems.<sup>135</sup> An intersectional framing of the lived experience of discrimination of minority women is essential to formulating an effective response to exclusion and difference that is attentive to the complex power relationships across multiple axes of discrimination. Reframing multiculturalism and reasonable accommodation through an intersectional mode of analysis enables us to connect theory and practice. Such an intersectional framing offers the possibility of a counter hegemonic political project that is linked with struggle. This link with struggle provides the vital aspect of intersectionality. Without it, an intersectional analysis becomes acontextual and simply a rhetorical tool. As Patricia Hill Collins and Kimberlé Crenshaw argue, intersectionality has struggle and a challenge to systemic inequality at its heart. It is important to connect this effort with the everyday struggles of racialised minority women and the important accommodations that go on in everyday life.<sup>136</sup>

As important, intersectional analysis highlights the violence of legal and administrative systems that are presented as race and gender neutral but are in fact what Dean Spade calls ‘the gendered racialization processes that produce the nation-state’.<sup>137</sup> Intersectionality highlights the hybridity of cultures and problematizes claims to a pure cultural authenticity thus enabling dialogue by mediating tensions across cultural difference. Intersectionality is of particular significance at this moment when differences between minority and mainstream women are perceived as irreconcilable.<sup>138</sup> Seeing minority groups primarily in terms of an essentialised culture ignores other identities such as class, sexual orientation, and pays inadequate attention to issues of structural disadvantage and systemic racism.<sup>139</sup> Any reliance on fixed cultural categories and

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<sup>133</sup> See Chandra Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses” (1988) 30 *Feminist Review* 61–88; Chandra Mohanty, *Feminism Without Borders: Decolonizing Theory, Practising Solidarity* (Delhi: Zubaan, 2006) 231.

<sup>134</sup> Mari J. Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1992) 14 *Women’s Rts L Rep* 297; Adrien Katherine Wing & Monica Nigh Smith, “Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban” (2006) 39:3 *UC Davis LR* 743 at 748.

<sup>135</sup> Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (New York: Routledge, 1990) at 229–30; Kimberlé Crenshaw, “Examining the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *U Chi Legal F* 139 at 22, 140.

<sup>136</sup> Sarat, *supra* note 130 at 401.

<sup>137</sup> Sumi Cho et al, “Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis” (2013) 38:4 *Signs* 785 at 787.

<sup>138</sup> Bannerji, *supra* note 11 at 7.

<sup>139</sup> *Ibid.*

binary understandings of religion/secularism, modernity/tradition misunderstands the ontologies of women' existence and thereby does them epistemic violence. This culturalization of politics has permitted liberal democracies to initiate legislation such as the *BPA* and *Secular Charter*, leaving unexamined the roots of oppression in terms of economic disempowerment and political disenfranchisement, reinforcing subalternity by neglecting the political economy of marginalization.

#### **D. Conclusion**

Official multiculturalism, linked with Reasonable Accommodation, is “an aspect of the ideological apparatus of the state.”<sup>140</sup> Official multiculturalism's focus on culture has deradicalised anti-racist politics and has erased race in its epistemological violence.<sup>141</sup> The uncritical conception of culture and diversity and its co-option by the rhetoric of state multiculturalism has dematerialised the understanding of culture making it a political tool, while rendering the language of diversity a tool of governance rather than a demonstration of the state's commitment to challenge inequalities.<sup>142</sup> For policies of multiculturalism and reasonable accommodation to respond to cultural difference without challenging systemic inequalities is inadequate in fighting the roots of oppression, racism and discrimination.<sup>143</sup> Difference cannot be characterised simplistically as a cultural category uninflected by relations of power and cannot be constructed as separate from structural inequality.<sup>144</sup> The discourse of diversity and reasonable accommodation has to be reframed. It is a contested site that minority racialised women can claim and offer counter-hegemonic interpretive frameworks of reasonable accommodation and multiculturalism that better reflect their lived realities and engage with their struggles against oppression, challenging the dialectic between conformity and 'difference' in state multiculturalism policy.<sup>145</sup>

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<sup>140</sup> *Ibid* at 131

<sup>141</sup> *Ibid* at 33.

<sup>142</sup> *Ibid* at 17.

<sup>143</sup> *Ibid* at 133.

<sup>144</sup> *Ibid* at 131.

<sup>145</sup> *Ibid* at 120.

