

R v NS: The Niqab in Court and Lessons in Religious Exemptions

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1. Introduction

In this article I examine a unique Canadian Supreme Court decision on the matter of religious exemptions. *R v NS*² concerns the request of a witness donning a niqab to be exempt from a rule of general application requiring witnesses to allow the court access to their demeanour. The three opinions delivered each convey a competing approach to the question of religious accommodation in a liberal-democratic state, creating a rare opportunity to measure the different arguments against one another, against the backdrop of real facts and concrete effects on individual rights. I highlight the deep disagreements between the Justices, and critically evaluate their arguments. I criticize the decision, which denied the request for religious exemption, by arguing that religious freedom should be interpreted as allowing a niqabi woman access to justice free from the condition that she unveils. I base my argument on the idea that religious practice is an exceptional category of behavioural choices, one that is protected based on liberal principles. I offer a principle by which to assess the exact extent of protection religious practice should receive – the “meaningful choice to practice one’s religion” principle – and apply it to the case to argue that the request for exemption should have been granted.

Faced with the competing claims of the accused in a criminal trial that the niqab impedes his right to trial fairness, and of the witness that her religious freedom demands that she be allowed to testify veiled, the Canadian Supreme Court is divided. The majority wants to avoid the conflict of rights at all costs. It defines narrowly the circumstances in which the question even arises, prefers a compromise in a case of conflict of rights, develops a detailed formula that will only limit religious freedom in extreme cases, and opts for limiting religious freedom in this case because in its circumstances the majority finds the balance of effects to be in favour of trial fairness. The concurring opinion redefines the question: instead of a conflict of rights it regards this a case of incompatibility between the witness’s personal behavior and the values of the Canadian justice system at large. Given this new focus, the concurring opinion finds that the niqab should never be allowed to be donned during a testimony. The dissenting opinion

¹ SJD Candidate, University of Toronto. This article is based on Naama Ofrath, *R v NS 2012 SCC 72 – Assessing the Contours of the Freedom to Wear the Niqab in Canada* (LLM Thesis, Queen’s University Faculty of Law, 2013)[unpublished, archived at QSpace, online: QSpace <<https://qspace.library.queensu.ca/handle/1974/8377>>]. I am thankful for their feedback and comments to Darryl Robinson, Will Kymlicka, Lisa Dufraimont, Sharry Aiken, Kevin Vallier and participants of The Fifth Bowling Green State University Workshop in Applied Ethics and Public Policy on “The Scope of Religious Exemptions” (Bowling Green, Ohio, April 17-18, 2015), two Oxford University Press referees, and Matthew Taylor.

² 2012 SCC 72, (*sub nom R v SN*) 353 DLR (4th) 577 [*R v NS*].

compares the niqab to other cases of less-than-ideal testimonies that are regularly accepted in courts. It extends to the niqab the same accommodation and argues in favour of always allowing the religious exemption. The three opinions arrive at their different conclusions by employing distinctly different arguments.

I develop my argument as follows. In part 2 I present the case and the three opinions comprising the decision. In part 3 I criticize the arguments of the concurring opinion against accommodating the niqab in court, which are based on a distinction between the niqab and other cases of less-than-ideal testimonies. I argue that the concurring opinion's reasoning is flawed, and offer reasons to extend to the niqab accommodation similar to other comparable cases. Finally, I try to make sense of the majority and concurring opinions' rejection of the equality-based argument. I offer an implied argument that I believe is shared by the two opinions and supports their conclusions: religious practice is chosen, and therefore does not deserve accommodation. In part 4 I criticize the implied argument. Accepting its premise – that the niqab is a chosen behaviour – I argue that this notion of choice is unhelpful in deciding questions of religious accommodation and exemption. Religious practice is a special category of choice that is granted protection in a liberal democracy. I then develop – based on another Canadian case, *Hutterian Brethren*³ – what I believe is a useful principle for assessing requests for religious exemptions: the “meaningful choice to practice one's religion” principle. In part 5 I conclude by discussing the lessons regarding religious exemptions that can be drawn from the debate of the case.

2. *R v NS*: Three Philosophies of Religious Accommodation

*R v NS*⁴ developed out of a criminal trial regarding sexual assault, during which one of the accused requested that his alleged victim be ordered to unveil – to remove her niqab⁵ – while testifying against him. The accused cited his right to a fair trial as the basis for his request, claiming that the niqab impedes full credibility assessment of the witness. NS, the witness, refused to unveil, citing her religious freedom. The judge ordered NS to remove her niqab, based on a finding that her religious belief was “not that strong” because she removed the niqab when she was photographed for her driver's licence and because she testified that she would remove it if required to do so at a border crossing.⁶ This decision sparked a legal debate that went all the way to the Supreme Court.⁷

³ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 [*Hutterian Brethren*].

⁴ *Supra* note 2.

⁵ The niqab is an Islamic veil covering a woman's head and face but revealing her eyes.

⁶ *R v NS*, *supra* note 2 at para 4.

⁷ NS applied to the Ontario Superior Court of Justice, which held that she should be allowed to testify wearing her niqab if she asserted a sincere religious reason for doing so, but that the judge could exclude her evidence if the niqab prevented true cross-examination (*R v NS*, (2009) 95 OR (3d) 735, 191 CRR (2d) 228, restated in *R v NS*, *supra* note 2 at para 5). Both NS and the accused appealed the judgment to the Ontario Court of Appeal which held that sincerity was the correct test for a request for religious exemptions and that the religious freedom of NS should

The Supreme Court considered the case as a request for religious exemption from a rule of general application. It posited that witnesses in courts are subject to a general requirement to allow access to their demeanour, and treated NS's refusal to unveil as a request for an exemption based on religious conviction. The three opinions delivered in the case are each based on a distinct legal philosophy, an excellent setting for reflecting on the question of religious accommodation and exemption.

Reasons for Judgment per Chief Justice McLachlin: The Balancing Rights Approach

Writing the majority's decision, McLachlin treated the case in question as a matter of conflicting rights that requires a balancing exercise as a solution: "Two sets of *Charter* rights are potentially engaged – the witness's freedom of religion (protected under s. 2(a)) and the accused's fair trial rights, including the right to make full answer and defence (protected under ss. 7 and 11(d))."⁸

Framing the question at hand as one of conflicting rights, McLachlin defines the court's role as applying the appropriate balance between the rights. Attending to the balancing act, McLachlin rejected what she called two "extreme" approaches.⁹ She rejected what she called a "secular"¹⁰ approach that requires witnesses to "park their religion at the courtroom door"¹¹ and *never allows* the niqab in court because this approach is "inconsistent with the jurisprudence and Canadian tradition,"¹² a "tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible."¹³ She rejected the opposing approach, according to which a witness is *always allowed* to testify wearing the niqab, because it may damage the fairness of a trial and lead to wrongful convictions. McLachlin found that "[w]hat is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict."¹⁴

be reconciled with the accused's right to a fair trial. The Court found that if reconciliation was not possible by way of adapting court procedures to accommodate the niqab, the right to a fair trial may require that NS be ordered to remove her niqab. The Court named several considerations to be included in the process of balancing the parties' rights, including, for example, whether the credibility of the witness was at issue and the degree in which the niqab impacted demeanour assessment (*R v NS*, 2010 ONCA 670, 102 OR (3d) 161, restated in *R v NS*, *supra* note 2 at para 6). NS appealed to the Supreme Court of Canada.

⁸ *R v NS*, *supra* note 2 at para 7, referring to the *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.

⁹ *R v NS*, *supra* note 2 at para 1.

¹⁰ *Ibid* at para 2.

¹¹ *Ibid*.

¹² *Ibid*.

¹³ *Ibid* at para 51.

¹⁴ *Ibid* at para 2.

Following precedents that set a test for balancing conflicting *Charter* rights,¹⁵ McLachlin designed a process of balance for this case that involved answering four questions:

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?
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?¹⁶

With respect to the first question, McLachlin found that a claim based on freedom of religion could be brought whenever the claimant holds a *sincere* religious belief, rejecting the “strength of belief” standard employed by the trial judge. She found that NS has manifested sincere belief and thus requiring NS to remove her niqab while testifying would interfere with her religious freedom.

The discussion of the second question, that of the risk to trial fairness, goes to the heart of the matter. McLachlin found that the right to a fair trial includes the right to make full answer and defence.¹⁷ The accused claimed that the niqab restricts the ability to assess non-verbal cues and thus prevents effective cross-examination as well as effective assessment of NS’s credibility:

A facial gesture may reveal uncertainty or deception. The cross-examiner may pick up on non-verbal cues and use them to uncover the truth. Credibility assessment is equally dependent not only on what a witness says, but on how she says it. Effective cross-examination and accurate credibility assessment are central to a fair trial. It follows ... that permitting a witness to wear a niqab while testifying may deny an accused’s fair trial rights.¹⁸

NS claimed that the importance of seeing the witness’s face is exaggerated but also that, to the extent that non-verbal cues are helpful, the niqab does not restrict the majority of them.¹⁹

¹⁵ *Deganaï v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12; *R v Mentuck*, 2001 SCC 76, 3 SCR 442.

¹⁶ *R v NS*, *supra* note 2 at para 9.

¹⁷ *Ibid* at para 15.

¹⁸ *Ibid* at para 18.

¹⁹ *Ibid* at para 19.

Considering the submissions, McLachlin found that a common-law rule required witnesses to testify with visible faces. This common-law rule was based on a “common law assumption”²⁰ that facial cues help assess credibility. McLachlin admitted that this was a mere assumption but argued that the assumption could only be displaced if demonstrated to be erroneous, and that the evidence provided by NS and interveners in the case was insufficient to that end.²¹ In my critique of the decision I will not challenge, in itself, the common-law rule requiring witnesses to testify with their faces revealed. Such a challenge is not particular to the niqab or to religious exemptions and, in fact, avoids the complexities that the niqab poses in the context of the court altogether. The purpose of the critique advanced in this article is to expose different approaches to religious accommodation and to draw lessons regarding religious exemptions.²²

Given the common-law rule, McLachlin found that covering the face may impede cross-examination²³ and credibility assessment,²⁴ and thus creates a risk to the right of the accused to a fair trial. However, covering the witness’s face poses a *real and substantial* risk to trial fairness *only if* the evidence in question is contested and the witness’s credibility is at issue.²⁵ The answer to the second question thus depends on the nature of the evidence that the witness is asked to provide.²⁶ And McLachlin found that in the case at hand, where NS’s testimony is pivotal and contested, the rights of the accused are at serious risk if the niqab is allowed.

²⁰ *Ibid* at para 21.

²¹ *Ibid* at paras 17, 20, 22.

²² While I do not examine the common law rule in this article, for the reason stated above, I acknowledge that a critique of this rule forms a vital step in the assessment of the request for religious exemption. The first task in such a process is to assess whether the rule of general application, from which an exemption is sought, is legitimate in and of itself. Most commentators on *R v NS* centre their critique on McLachlin’s support of the common law rule and of demeanour evidence. Beverly Baines criticizes McLachlin for advancing the common-law assumption “for which she provided no evidence or precedent” and for refusing to weigh arguments against it (Beverly Baines, “Banning the Niqab in the Canadian Courtroom: Different Standards for Judges” JURIST - Forum (24 January 2013), online: JURIST – Forum [Baines]). Stephanie Voudouris criticizes the assumption that demeanour can be easily assessed and that the niqab hinders this assessment (Stephanie Voudouris, “Peeling Back the Court’s Decision in *R v NS*” The Court (23 January 2013), online: The Court [Voudouris]). Lisa Dufraimont also argues that “[t]he weight of the empirical evidence supports the view that facial cues and other aspects of demeanour are not reliable guides in assessing the truthfulness of witness testimony”; but nevertheless finds that “the Court’s cautious approach in *S.(N.)* appears prudent in an area where the empirical claims advanced strain against the law’s basic assumptions about procedural fairness” (Lisa Dufraimont, Annotation of *R v S(N)*, (2013) 98 CR (6th) 5 at 5, 6). Faisal Bhabha criticizes the decision’s adverse effect on the marginalized group of niqabi women. The core of his critique, I believe, is that the majority did not allow flexibility of procedural rules that could avoid such adverse effect (Faisal Bhabha, “*R v NS*: What’s Fair in a Trial? The Supreme Court of Canada’s Divided Opinion on the Niqab in the Courtroom” (2013) Alberta LR 50(4), 871-882). Natasha Bakht, writing about the niqab in courts before the case was published, criticizes demeanour evidence as well (Natasha Bakht, “Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms” in Ralph Grillo et al eds, *Legal Practice and Cultural Diversity* (Surrey: Ashgate Publishing Ltd, 2009) 115-133.

²³ *R v NS*, *supra* note 2 at para 24.

²⁴ *Ibid* at para 25.

²⁵ *Ibid* at paras 27, 28.

²⁶ *Ibid* at para 29.

Both religious freedom and trial fairness at stake, McLachlin moved to discuss the proper solution. And although she had earlier rejected the idea of any solution denying completely one of the rights,²⁷ she found that

On the facts of this case, it may be that no accommodation is possible; excluding men from the courtroom would have implications for the open court principle, the right of the accused to be present at his trial, and potentially his right to counsel of his choice. Testifying without the niqab via closed-circuit television or behind a one-way screen may not satisfy N.S.'s religious obligations.²⁸

Unable to find an alternative that upholds both rights, McLachlin moved to assess the balance of effects of requiring a niqabi witness to unveil. Her findings are a testimony to her commitment to trial fairness and the common-law rule requiring witnesses' faces to be visible. She found that the deleterious effects of limiting a sincerely held religious practice depended on several considerations, such as the importance of the practice to the claimant and the degree of state interference with the practice in light of the actual situation in the courtroom.²⁹ She further mentioned broader societal effects to be considered as well, including the effect on other potential claimants and the potential harm to justice at large should victims choose not to come forward with their claims, a consideration that may be especially weighty in sexual assault cases.³⁰ But all these heavy considerations were ultimately subordinated to the salutary effects of assuring a fair trial for the accused and "safeguarding the repute of the administration of justice" since "the right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble."³¹ With regard to the case at hand, McLachlin concluded that "where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab."³²

McLachlin's balance-of-rights approach to religious accommodation is, I argue, liberal and neutral in essence. Her analysis focuses on the effect on individual rights. She requires evidence of concrete, substantial, harm to an individual as a basis for any request to limit the rights of another. She measures individual rights against one another, on a levelled playing field devoid of external considerations. She prefers a compromise whenever it is possible, steering away from a value-ridden debate over a possible hierarchy of rights or values. Though she did not find a suitable compromise for this case, the legal test she applied requires that a compromise will be

²⁷ *Ibid* at para 31.

²⁸ *Ibid* at para 33.

²⁹ *Ibid* at para 36 (when assessing the importance of the practice to the claimant the strength of the religious reason – rather than its sincerity – would be important).

³⁰ *Ibid* at para 37.

³¹ *Ibid* at para 38.

³² *Ibid* at para 44.

sought in every case, according to its specific facts. Her approach calls for an effort to achieve accommodation. McLachlin also limited her conclusion to the particularities of the case. She suggested that the right to a fair trial may be at greater or lesser risk in different kinds and stages of proceedings,³³ and with respect to different kinds of evidence a witness is asked to provide.³⁴ She stressed that this list of factors is not closed and could change based on the facts of future cases as well as on future scientific evidence with regard to the importance of seeing a witness's face. She thus preferred the respect to individual rights over a principled universal approach. Such an approach upholds individual liberty and defines the role of the court as an arbitrator of effects rather than of values.

Concurring Reasons per Justice LeBel: The Societal Values Approach

LeBel's reasons were labeled "concurring" because he reached McLachlin's conclusion that NS's appeal should be dismissed.³⁵ But a review of his reasons reveals that LeBel's approach competes with that of McLachlin. When defining the questions involved in the case, LeBel J said:

The Court of Appeal and the complainant treated the issue in this case as purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence. This clash arises, but the equation involves other factors. *The case engages basic values of the Canadian criminal justice system. Is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?*³⁶

His reasons are an elaborated answer to the question in the negative.

LeBel first referred to the question of balancing rights. Considering this particular case, he accepted McLachlin's conclusion that such a balance requires that NS removes her niqab.³⁷ But he rejected McLachlin's case-by-case balancing-of-rights approach with its sensitivity to particular facts and multiple competing considerations, and said:

We should not forget that a trial is itself a dynamic chain of events. It can often be difficult to foresee which evidence might be considered non-contentious or important at a specific point in a trial. The solution may vary at different stages of a trial, and also with what is known about the evidence. What looked unchallengeable one day might appear slightly dicey a week later. Given the

³³ *Ibid* at paras 39-42.

³⁴ *Ibid* at para 43.

³⁵ *Ibid* at para 58. See also Baines, *supra* note 21.

³⁶ *Ibid* at para 60. Emphasis added.

³⁷ *Ibid* at paras 62-68.

nature of the trial process itself, the niqab should be allowed either in all cases or not at all when a witness testifies.³⁸

Opting for a clear rule that is set in advance, LeBel turned to offer a principled reason for not accommodating a witness's niqab. His reasoning is based on the transformation of the idea of open communication from a requirement applying to the court system to a requirement applying to individuals participating in the trial process. LeBel first defined a system of "open and independent courts" as "critical to the maintenance of the rule of law, a fundamental Canadian value."³⁹ The principle of openness is the reason courts are generally open to the public, which "is entitled to know or learn about what goes on before them."⁴⁰ "From this broader constitutional perspective, the trial becomes an act of communication with the public at large,"⁴¹ said LeBel. He then made the transformative move: A trial is also "a process of communication" within the courtroom itself.⁴² This communication, between the individual parties and between them and the court, must itself be "open," for the process of the communication with the public to fulfill the constitutional ideal. And the niqab compromises this open communication in court:

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.⁴³

LeBel's approach subordinates individual rights to societal values – in this case openness. In the next part I will critically analyze LeBel's argument in detail, arguing that he failed to show that the niqab presents greater challenges to communication than a number of other cases, which are regularly accommodated in courts. As the niqab does not intervene with an accused's rights more than other cases, a pure balance of rights process should have reached similar conclusions. The insistence that the niqab would not be accommodated is thus a statement that the niqab presents a challenge in principle, rather than in terms of concrete harm. The requirement that an individual will uphold the character of the system even at a significant price to her basic interests and rights highlights the preference for societal values.

Dissenting Reasons *per* Justice Abella: The Equality-Based Approach

Abella's dissenting reasons challenge the common law rule applied by the majority and concurring opinions, as well as the approach to religious freedom that each of the opinions

³⁸ *Ibid* at para 69.

³⁹ *Ibid* at para 74.

⁴⁰ *Ibid* at para 75.

⁴¹ *Ibid* at para 76.

⁴² *Ibid* at para 77.

⁴³ *Ibid* at para 78.

expresses. As shown above, both McLachlin’s and LeBel’s reasons appeal to the requirement based on the common law assumption that concealing the face while giving testimony may impede credibility assessment, and thus the risks either the rights of the accused, or the integrity of the justice system itself. Abella started by conceding that “seeing more of a witness’s facial expressions is better than seeing less,” but rejected the idea that seeing less of the witness’s face is so harmful to the fairness of the trial that a witness should be asked to remove her religious veil.⁴⁴

Abella challenged the application of the common law rule to the niqabi witness by comparing niqabi women to other witnesses who enjoy exemption from the rule. She found that the ideal that witnesses’ demeanour should be visible to the court was often compromised, and that this compromise alone never disqualified a testimony.⁴⁵ The examples she gave included witnesses who are hard of hearing, who do not speak the language,⁴⁶ who have “physical or medical limitations that affect a judge’s or lawyer’s ability to assess demeanour,” such as witnesses who have suffered a stroke or have a speech impairment.⁴⁷ She also described situations in which evidence is accepted without the court being able to assess demeanour at all, such as a transcript of evidence from a disabled witness unable to attend court,⁴⁸ and other exceptions to hearsay evidence.⁴⁹ “[W]e are left to wonder,” she concluded, “why we demand full ‘demeanour access’ where religious belief prevents it.”⁵⁰

Relying on this comparative analysis, Abella challenged not only McLachlin’s and LeBel’s conclusions in the case of NS, but also the broader ideas on which their reasons are based. By portraying the question at hand first and foremost in terms of equality of access to justice, she denied McLachlin’s view that the case involved *only* the right to a fair trial and religious freedom. By bringing in the comparative case, Abella also challenged LeBel’s claim that individuals accessing courts are compelled to communicate openly with all participants in the process – that “open communication” is a pivotal principle of justice preceding individual rights.

Abella’s reasons for rejecting her colleagues’ conclusions lay in what she found are the outweighing deleterious effects of requiring a witness to unveil.⁵¹ Her description of these effects is revealing, too, of her unique approach to religious freedom. Abella described the effects of the majority’s decision from the witness’s own perspective. A sincere believer dons a niqab out of what she experiences as a divine command that is “‘obligatory and nonoptional’, that is, as not

⁴⁴ *Ibid* at paras 82, 91.

⁴⁵ *Ibid* at paras 97-106.

⁴⁶ *Ibid* at para 102.

⁴⁷ *Ibid* at para 103.

⁴⁸ *Ibid* at para 104.

⁴⁹ *Ibid* at para 105.

⁵⁰ *Ibid* at para 108.

⁵¹ *Ibid* at para 86.

providing a genuine choice to the religious believer.”⁵² A court’s decision preventing her from acting according to her religion will force a witness to choose between pursuing justice and respecting the divine command.⁵³ Complainants who believe that they cannot choose to remove the veil will thus not bring charges for crimes against them, or will refuse to testify. A believer’s right to a fair trial is also violated by the majority decision because believers who are accused will not be allowed to testify in their own defence.⁵⁴ Abella found that this result undermines the public perception of the fairness of the justice system as a whole.⁵⁵ Abella further highlighted the specific damage that the rule McLachlin offers will cause in cases of sexual assault:

The majority’s conclusion . . . 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, as previously noted, may be no meaningful choice at all.⁵⁶

By use of the comparative case, Abella shed light on two connected issues unaccounted for by her colleagues: the effect of the decision on victims’ access to justice, and the normative implications of the possibility that the niqab is perceived by the practitioner as mandatory. These two issues will form the basis of my critique of the majority and concurring opinions, to which I now move.

3. A Critique from Equality

I have shown that the three opinions follow competing arguments. In this part I measure the approaches against one another by criticizing the decision following Abella’s focus on equality. I argue that there are conclusive reasons to extend to niqabi witnesses the accommodation that some other groups of witnesses receive, such as witnesses whose disabilities restrict facial cues. The majority and concurring opinions discriminated against niqabi witnesses without proper justification. McLachlin simply supported the general common law rule that witnesses testify with their faces uncovered but failed to account for the many cases where this rule is abandoned and to give reasons why NS would not be another such case.⁵⁷ LeBel acknowledged that courts

⁵² *Ibid* at para 93, quoting Martha C Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008) at 117.

⁵³ *R v NS*, supra note 2 at paras 93, 94.

⁵⁴ *Ibid* at para 94. I suspect that Abella J might be making a mistake here. The accused already enjoys a right not to testify against herself (Charter, supra note 11, s 11(c)). She can thus escape the problem altogether, if she so wishes. If she wishes to testify in her own defense, why would the prosecution ask her to unveil? The accused testifying veiled is an improvement over her not testifying at all. It seems like the prosecution does not have a valid claim of harm.

⁵⁵ *Ibid* at para 95.

⁵⁶ *Ibid* at para 96.

⁵⁷ In fact, McLachlin even goes further by claiming that the few supposedly exceptions to the common-law rule actually confirm the rule. She mentions two aids: permitting children to testify via closed-circuit TV – permitted because it does not prevent the accused from seeing the witness – and testifying by audio link – permitted only when

exempt some witnesses from this rule, and gave a reason for discriminating between those witnesses and niqabi witnesses. As I will argue below, this reason is not persuasive.

A Critique of LeBel's Reasons

Why should niqabi witnesses not receive the same exemption from the common law requirement of open testimony that witnesses with disabilities receive? How can it be justified that the rule about full access to demeanour makes an exception for one group of witnesses but not for the other? The answer has to lie in a relevant differentiating factor between the two groups.

LeBel's concurring opinion found that the niqabi witness should be treated differently from the witness with a disability because the result of each case of accommodation is different in terms of "advancing communication." As noted above, LeBel described the credibility of the criminal justice system as dependent on a process of open communication. LeBel then referred directly to exceptions to the "openness" rule accepted in courts:

To facilitate this process [of communication], the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings. Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqab, on the other hand, does not facilitate acts of communication. Rather, it restricts them. It removes the witness from the scope of certain elements of those acts on the basis of the assertion of a religious belief in circumstances in which the sincerity and strength of the belief are difficult to assess or even to question. The niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors.⁵⁸

LeBel then finds that exceptions to the common law rule are justified when the overall aim of communication is promoted, and he believes that this is true of some witnesses, but not of niqabi witnesses. This argument in favour of discriminating between witnesses with disabilities and niqabi witnesses is unpersuasive for three reasons. First, LeBel made a mistake with regard to the alternatives he considered in the analogy of the two cases. Second, the baseline LeBel used when analyzing the effects of accommodation in the case of the niqab fails to respect NS's religious

the judge is satisfied that no prejudice is caused to either of the parties by the fact that the witness would not be seen by them. McLachlin does not refer to other cases, to which LeBel and Abella refer, in which persons with demeanour-affecting disabilities or linguistic barriers are allowed to testify, cases that clearly challenge the common-law rule (*R v NS*, *supra* note 2 at para 23).

⁵⁸ *R v NS*, *supra* note 2 at para 77.

freedom. These two moves lead him to the erroneous conclusion that it is justified to discriminate between the two groups. Third, the reasons for making the exception for witnesses with “handicaps” in the first place are equally applicable to niqabi witnesses. I will consider the first two, related, flaws in the argument in this section, and the policy reasons to prefer equal treatment of niqabi witnesses in the next.

LeBel compared disabled witnesses with niqabi witnesses in terms of “facilitating communication” but failed to adequately take into account the analogous alternatives in the two cases. LeBel found that the efforts to overcome the obstacles to communication posed by handicaps facilitate communication. This statement is true given the two alternatives to such efforts: in the first, a witness with a disability is not allowed to testify at all. In the second, a witness with a disability is allowed to testify but no effort is made to facilitate the testimony. Indeed, allowing a witness with a disability to testify *and* making an effort to facilitate the communication of the testimony in a clear and comprehensible manner would facilitate communication. Without such efforts the testimony would not be heard at all or could end up useless and tantamount to no testimony at all.

A fair and comprehensive analogy with the case of the niqabi witness must follow carefully the steps taken in the case of the witness with a disability. In the first alternative, the niqabi witness will not be allowed to testify wearing the niqab. In this alternative it should be considered that, as a result, at least some niqabi women will choose not to testify at all.⁵⁹ This alternative does not facilitate communication in the same way that not allowing a disabled witness to testify does not facilitate communication. LeBel neglected to consider this option. But this is a very realistic possibility, especially since, as noted by Abella, religious persons experience religious commands as mandatory. A legal rule requiring them to neglect a religious practice in order to participate in a certain activity may be experienced by them as excluding them from the activity.

In the second alternative, the niqabi witness is ordered to testify unveiled, and she does so. Here, it should be considered that the niqabi witness might not behave naturally and her demeanour and communication will be inauthentic. The submission of LEAF illuminates why this might be the case:

[T]he lower Court correctly acknowledged that the truth seeking function of the criminal trial may be subverted by requiring N.S. to testify without her niqab, given the unreliability of her demeanor when stripped of her niqab in public, possibly for the first time in eight or more years: “without the niqab, N.S. would be testifying in an environment that was strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be

⁵⁹ This possibility was mentioned by the Canadian Civil Liberties Association (*R v NS*, 2012 SCC 72, (sub nom *R v SN*) 353 DLR (4th) 577 (Factum of the Intervener Canadian Civil Liberties Association), online: CCLA at para 15 [FOI CCLA]).

misled by her demeanor” (para. 81). Indeed any witness would behave differently if asked to testify without, for example, his or her shirt on.⁶⁰

It should be noted that unveiling may cause more than estrangement and discomfort. For the devout believer, unveiling means dishonoring a divine command. The demeanour of an unveiled witness may be revealing more of her feelings towards the breaking of the divine command than towards the content of the testimony, to the detriment of the ability to assess the credibility of the account the witness is providing at the time. An inauthentic testimony does not facilitate communication.

LeBel failed to take the alternative possible outcomes into consideration. LeBel only envisioned one option, where the niqabi witness both testifies without her niqab *and* her demeanour is not affected by her being unveiled, and his conclusion was based on this assumed scenario. Considering the possibility that at least some niqabi women will not testify unveiled at all, or that their testimony will be inauthentic, makes it clear how allowing a niqabi woman to testify wearing her niqab does, in fact, facilitate communication. Thus it is the alternative in which the niqab is accommodated that should be equated with “the efforts to overcome these obstacles [posed by handicaps]” to which LeBel refers.

Related to the failure to imagine alternative scenarios is a second, in some respects more fundamental, objectionable move. As I noted above, LeBel thinks an accommodation is appropriate when it improves communication and inappropriate when it impedes it. The assessment of the effect of accommodation is inherently comparative: it compares the communicative results of the accommodation with communication under some default or baseline situation in the absence of accommodation. If communication is better with the accommodation than it is in the baseline case, then the accommodation is appropriate.

In assessing the effect of accommodation, LeBel considers a different baseline for each of the two cases, that of a witness with a disability and that of a witness donning a niqab. When he considers persons with disabilities, LeBel compares an accommodated testimony with the testimony that the witness can give without accommodation. The accommodation offered by the court facilitates communication in the sense that it offers an improvement over the baseline of a natural, unaccommodated, testimony. When a witness with a disability is concerned, the baseline is rather clear: LeBel does not consider the baseline to be the testimony that a fully able-bodied person would give. Relative to such a ludicrous baseline, even the most effective measures to improve communication in testimony would still yield a loss in terms of communicative effectiveness. And if they could only yield a loss, then according to LeBel’s reasoning, that would count against accommodating the witness with a disability.

⁶⁰ *R v NS*, 2012 SCC 72, (sub nom *R v SN*) 353 DLR (4th) 577 (Factum of the Intervener Women’s Legal Education and Action Fund), online: LEAF at para 12 [FOI LEAF]. Voudouris uses the same idea as one basis for her criticism of the decision (*supra* note 22).

But when he considers niqabi witnesses, LeBel compares the accommodated testimony with the testimony that the witness would have given if she was unveiled and unaffected by it. Basically, LeBel considers as a baseline the witness who *never dons a niqab*. Measured relative to this baseline, accommodation of the veiled testimony naturally still counts as a loss in communication. But, while this way of comparing communication outcomes was obviously unfair and irrelevant in the case of witnesses with disabilities, LeBel focuses exclusively on this comparison in the case of niqabi witnesses. He does not consider the baseline case to be where the niqabi woman approaches the court donning her niqab. From this baseline, accommodation can clearly count as a gain in communication. It is unclear why while persons with disabilities are accepted as they are in courts, niqabi women would not be. Even if the final result of the legal analysis would limit the donning of the niqab in court, the baseline for consideration should be the one where NS regularly dons the niqab, as is her actual experience.

Reasons Not to Discriminate Between Handicaps and the Niqab

The third flaw in LeBel's decision is his failure to recognize that reasons of access-to-justice and of criminal responsibility which support abandoning the common law rule of open testimony in the case of a witness with a disability extend to a niqabi witness as well. LeBel referred to the importance of access to justice, noting that "the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial."⁶¹ This reason for exempting disabled witnesses from the open-testimony common law rule, namely, allowing them access to justice, equally applies to niqabi witnesses. The complementing idea of equal criminal responsibility also applies equally to both groups and justifies accommodation in court.

If a person with a disability is not allowed to testify against an assailant, her access to justice is denied. Access to justice is not just a basic right in itself and a foundation of a just legal system but is also an important guarantee of all other rights, as clearly stated, for example, in s 24(1) of the Canadian *Charter*:

24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.⁶²

Access to justice is one of the most effective means to guarantee all other rights. The guarantee that, should your right be violated, you can approach the courts and receive a remedy is, to a

⁶¹ *Ibid* at para 77.

⁶² Section 24(1) applies only to rights and freedoms guaranteed by the *Charter* and to the relationship between individuals and the state. It thus does not guarantee a general right to access justice. Other laws create rights between individuals and between individuals and the state as well as specific avenues to access justice should rights be infringed. But the *Charter* exemplifies here a broader principle of access to justice: the idea that rights and obligations must, as a matter of justice, be enforceable. On the centrality of access to justice as a principle of the rule of law see e.g. Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 216-217.

great extent, what deters potential violators from violating your rights in the first place. In many cases, a testimony is necessary for holding the alleged violator responsible for violating the victim's right. For this reason a decision with regard to the admissibility of a testimony has an actual bearing on a victim's right.

Unequal access to justice thus creates inequality with regard to all other rights. This effect is amplified when the group of those suffering from limited access to justice is easily identifiable to potential violators *ex ante*. If known legal rules limit the access to criminal justice of certain easily-identifiable groups – such as children or some persons with disabilities – then potential violators will be less deterred from violating the rights of persons belonging to these groups compared to the rights of others who enjoy full access to criminal justice. This deleterious effect is one reason that courts accept testimonies from persons with disabilities although their demeanour cannot be fully assessed. As Faisal Bahaba puts it, “despite citing values of diversity, inclusion and access to justice, the majority's analytical framework leads to the inevitable result that women like NS will find themselves outside of Charter protection.”⁶³

Finally, access to justice is important not only for NS herself, but also for the public as a whole. McLachlin and LeBel were of the opinion that the accused's right to a fair trial should be zealously preserved for the system to maintain its image of justice. But as Bahaba rightly notes, access to justice plays a similar role in upholding such an image:

The ... formulation of trial fairness in the majority's judgment emphasized systematic and institutional integrity. This view concentrated on public interest considerations and prioritized the maintenance of confidence in the criminal justice system as a whole. Yet, the majority's consideration of the public interest was remarkably narrow, focussing [sic] almost entirely on the public perception of the treatment of the accused in the trial process. Fairness was defined as an abstract and idealized standard of accuseds' [sic] rights, with little consideration of the perspectives of other participants in the trial such as victims of sexual assault or vulnerable members of the public.⁶⁴

Complementing access to justice is criminal responsibility. Another reason for allowing exceptions from rules of evidence and testimony, such as the exception for witnesses with disabilities from the common-law rule requiring open testimony, is a consideration of equal criminal responsibility. Not allowing the exception would mean that some criminals will not be held accountable, not because of the nature of their crime, but because of irrelevant characteristics of their victims.

The same considerations apply to niqabi women. Not allowing niqabi women to testify veiled could mean that some criminals will not be held accountable, not because of the nature of their

⁶³ Bhabha, *supra* note 57 at 10.

⁶⁴ *Ibid.*

crime, but because of the religious identity of their victims. To summarize, if they are not allowed to testify veiled, niqabi women's access to justice is compromised, either because they might not testify at all or because their testimony might be less than authentic. This disenfranchisement also means that they are more vulnerable to assault than the next person because their assaulter can anticipate not suffering from the hand of the law. And in the case of an actual violation, their assaulter may escape criminal responsibility. A rule requiring that the accused should have unmitigated access to the accuser's non-verbal cues adversely affects both groups – persons with disabilities and niqabi women – in the same manner and to the same extent.

Implied Reasons of the Majority

I have argued that the distinction between witnesses with disabilities and niqabi witnesses drawn by LeBel is not persuasive. The distinction based on the consideration of communication makes acute mistakes in the analogy between the cases, it is initiated from a position disrespecting the niqabi woman, and it fails to acknowledge that reasons to exempt disabled witnesses from the common-law rule of open communication apply equally to niqabi witnesses.

There is a more persuasive argument distinguishing between handicaps and the niqab. Indeed, I believe that both McLachlin's and LeBel's positions are informed – albeit not explicitly – by the argument.⁶⁵ For this reason I refer to this argument as “implied” in their reasons. I believe that McLachlin's and LeBel's insistence on the common-law rule requiring an open testimony and their resistance to Abella's equality-based critique are based on a distinction they make between *chosen behaviour* and *non-chosen personal characteristics*.

According to the implied argument, the niqab is not equivalent to a disability because the niqab is a choice while a disability is a condition. Donning a niqab is a behaviour. The niqab wearer can choose to not wear it and the niqab can be removed. Disability, on the other hand, is a circumstance, a condition beyond the power of volition of its subject. A witness with a disability cannot choose to become able for the time of her testimony, whereas a niqabi witness can choose to unveil for that time. According to the argument, persons with disabilities are denied access to justice if their disability is not accommodated in court while niqabi women are not.

According to the argument discriminating between choices and circumstances, the niqabi woman in fact enjoys full access to justice, but she chooses not to exercise it. This choice is her right but, if the niqabi woman will not testify without her niqab, she has no valid complaint against others with respect to the consequences in terms of access to justice. If she is worried about the adverse effect on her access to justice, she is free to avoid this effect. The argument implied by the

⁶⁵ Although McLachlin ignored the analogy with disability made by both Abella and LeBel, I assume that their claims regarding witnesses exempted from the rule reflect a legal reality. I further assume that this judicial reality is not merely tolerated by McLachlin but also found justified by her. In fact, as Abella notes, some of the exceptions Abella refers to were ordered by McLachlin herself (*Ibid* at para 105, quoting McLachlin (as she then was) in *R v Khan*, [1990] 2 SCR 531, 41 OAC 353).

choice-circumstance dichotomy is that a person who voluntarily chooses a course of action takes upon herself the consequences of her action. Contrarily, a person limited by circumstances is not responsible for such consequences. The argument is applying the ‘Volenti non fit iniuria’ maxim, according to which a person who consents to an effect on himself cannot be seen, legally speaking, as harmed by the same effect.⁶⁶

The argument distinguishing between choices and consequences is interesting and not without merit. I will dedicate the next part to exploring the argument, defending it to a certain extent, but criticizing its application to the question of faith-based choices at large and to the question of accommodating the niqab in court in particular. The critique will highlight what I think are the unique features of faith-based behaviour and the reasons it deserves a particular treatment in the form of accommodation or exemption.

4. A Critique from Religious Freedom: A Meaningful Choice to Practice One’s Religion

R v NS was effectively decided based on a distinction between unfavourable circumstances like a disability, and personal choices like the religious practice of donning the niqab. The majority and concurring opinions rejected Abella’s view that the niqab should be legally treated as a non-choice, as a circumstance, because it is subjectively experienced by the practitioner as mandated by a divine command. The majority and concurring opinions preferred the view according to which the niqab is chosen by the practitioner and thus is distinguishable from personal circumstances, such as disability, for the purposes of accommodation.

I want to offer a middle approach to the niqab that I believe best expresses the liberal ideals of liberty and equality. According to this approach any religious practice, the niqab included, is considered a personal choice from the standpoint of the polity. Nevertheless, personal choices informed by religious conviction deserve special, though not absolute, protection. The notion of choice is helpful in explaining why religious freedom is, like all other rights, not absolute, and why not *every* request for accommodation based on religion should be fulfilled. But this notion of choice in itself is unhelpful in generating a decision-making principle that will guide us in determining *which* requests for accommodation should be accepted. For the purpose of defining a principle to determine when accommodation of religious needs will be granted, a more useful principle is that of a “meaningful choice to practice one’s religion,” offered by McLachlin in *Hutterian Brethren*.⁶⁷ As I will argue in this part, the idea of “meaningful choice” supports always accommodating the niqab in court.

⁶⁶ Joel Feinberg, “Legal Paternalism” (1971) 1:1 *CJ Phil* 105 at 106-107.

⁶⁷ *Supra* note 4.

Before I commence with my critique, it should be noted that the law commonly distinguishes between choices and circumstances. As Carissima Mathen notes, the distinction between choices and circumstances plays a prominent role in non-discrimination jurisprudence. When claimants approach the court with a request to receive a benefit under a certain law, the court checks to which group of persons the law applies. If the claimants do not compose part of the group by virtue of the claimants' choice, rather than by virtue of unfavourable circumstances, the court does not consider the law to be discriminatory.⁶⁸ This distinction may explain the failure of Abella's equality-based approach, which adopted the subjective experience of the practitioner, who views the niqab as mandated. Abella's counterparts view the niqab as chosen by the practitioner, leading them to reject the discrimination claim that is generally inapplicable to choices.

While a distinction between choices and circumstances plays a determinative role in non-discrimination jurisprudence, a rejection of a request for religious exemption based on the notion that religious practice is chosen does not sit well with any conception of religious freedom. The legal norm of religious freedom is meant to protect the *practice* of religion, which – from the non-subjective point of view preferred by McLachlin and LeBel – is always chosen. If that was not the case, religious freedom would be limited to the freedom to belong to a religious group. This definition of religious freedom is not only redundant in a system that already prohibits discrimination on the basis of belonging to a religious group (as in Canada, under section 15 of the *Charter* and in equality jurisprudence, and in most other liberal regimes). It also empties even belonging in a religious group of most of its meaning. It is hard to imagine what belonging to a religion means without the freedom to act upon religious conviction. Religious choices merit a different treatment than other personal choices.

Liberal democracy characterizes religious practice as a choice in the sense that liberal democracy does not accept religious reasons as decisive reasons in the political sphere. Religious persons act in accordance with what they believe is a divine command. For some religious persons the divine command gives decisive reasons for action in all areas of life and under all circumstances. For religious persons, the authority of the divine command is absolute and decisive. But in a diverse society, religious persons and non-adherents live together under one legal-political regime. And the divine command behind religious reasons for action does not offer to non-adherents any reason for private action, and no decisive reasons to regulate the political sphere in any given way.

⁶⁸ Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 *JL & Equality* 163 at 172-73 [Mathen]. Such, for example, was a case reaffirming the exclusion of common-law partners from a property-division regime designed for married couples. The court justified the rule by claiming it was respecting the autonomous exercise of the individual's choice not to marry (*Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325).

The fact of diversity informs the liberal idea that political action should be justified in terms that are reasonably acceptable by all, what Rawls calls a “public reason.” The core idea of public reason is the requirement of reciprocity in reason-giving:

Hence the idea of political legitimacy based on the criterion of reciprocity says: Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.⁶⁹

Public reason is the commitment of a liberal democracy to only pass laws and policies that are justified by reasons that each member of society can be reasonably expected to reasonably accept.⁷⁰ By doing so, liberal democracy hopes to suffice the condition of equal liberty and fulfil the ideal that persons with different personal conceptions of the good can live together. Public reason fulfils the requirement of liberty by providing citizens with reasons for action that each citizen can reasonably adopt as her own. A citizen is not only expected to follow rules because the state has the power to enforce them but because these rules are justified by reasons that the citizen can reasonably adopt as her own. In that sense the citizen can be said to be autonomous. Public reason fulfils the requirement of equal respect by providing to all citizens reasons that they could reasonably accept. As Rawls says, “[public reason] is a relation of free and equal citizens who exercise ultimate political power as a collective body.”⁷¹

Religious reasons for action are founded on a concept of divine authority and it is this authority that makes religious practices obligatory in the eyes of the believer. But divine authority gives reasons only to those who buy into the concept, and does not provide reasons to non-adherents to accept the obligatory nature of the practice. Divine authority as a ground for public policy thus violates the value of equal respect to all citizens, the idea that authority should be justified with reasons that everyone can reasonably accept. For this reason divine authority is nonreciprocal and is inadmissible in itself as a public reason.

Divine command nevertheless can be translated, to some extent, into public reason. Such a translation will work in the following way: Everyone wants and should be allowed to pursue the good life as they see it. The freedom to pursue the good life as one sees it is a general value that everyone can be reasonably expected to reasonably accept. This principle fulfils the ideals of liberty and equality. A religious person sees the good life as the life in which she can follow a certain practice, such as donning the niqab, which she believes is commanded by the divinity. In the same way that everyone wants and should be allowed the freedom to pursue one’s conception

⁶⁹ John Rawls, “The Idea of Public Reason Revisited” (1997) 64:3 *U Chicago L Rev* 765 at 771 [Rawls].

⁷⁰ T M Scanlon, when discussing morality and not merely justice, makes a similar claim that an action is right if it can be justified to others by reasons that they could not reasonably reject. See T M Scanlon, *What We Owe to Each Other* (Cambridge, MA; London: Harvard University Press, 1998).

⁷¹ Rawls, *supra* note 69 at 769-770.

of the good life, the religious person wants and should be allowed the freedom to pursue her conception of the good life by practicing her religion.

By translating the divine command into the language of the pursuit of the good, a religious person can give a public reason for the protection of practices that are mandated, in her eyes, by divine command. Religious reasons can therefore be translated into public reason, but the requirement of reciprocity demands that personal liberties are not absolute, that personal reasons for action are left indecisive reasons. Persons are entitled to exercise their liberty *only when* the liberties of others are left preserved. Religious reasons therefore lose the absolute power of the divine command. While one may personally believe that divine commands command categorically, and that one absolutely cannot fail to comply, any divine command that would violate the liberties of others cannot pass the liberal translation into public reason. Thus, in liberal society, a religious reason is conditioned on respect for others' freedoms, and though it is subjectively perceived by the believer as a decisive reasons, in the public realm it holds the power of one equal reason amongst many.

When they lose their decisive power, religious reasons become choices: private reasons for action worthy of respect but subject to the reciprocity requirement. This feature is not unique to religious reasons. All personal reasons, to suffice the requirement of reciprocity, lose their absolute command when the liberties of others are at stake. The requirement to give reasons to others who do not share adherence to the divine command, or to any other philosophical categorical imperative, results in abandoning the absolute justificatory force of the divine command and replacing it with the justificatory force of liberties at large. The commitment to equal liberty inevitably results in the characterization of religious reasons as private reasons which the polity is obliged to take into account, but not as decisive reasons to adopt a policy.

Some, like Paul Horwitz, criticize the inability of liberalism to accept the obligatory nature of religious reasons:

The value of liberal democracy is its willingness to cherish religious freedom as a valuable part of the freedom of any autonomous individual. Where it fails is in its inability to fully recognize that religion is (or, at least, may be) more than a mere choice on the individual's part. Rather, it is a radically different but equally valid mode of experiencing reality. As long as the religious adherent's practices are private, or public but minimally intrusive, they are accepted; but where these conditions do not apply, where the beliefs are taken so seriously as to interfere with the liberal understanding of the public good, the liberal state views religion as a choice that is wrong, unreasonable, or dangerous, according to liberal epistemology, and so denies the possibility of co-existence.⁷²

⁷² Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 *UT Fac L Rev* 1 at 24.

I, on the contrary, suggest that this tendency of liberalism is a necessary outcome of liberalism's commitment to equal liberty. The commitment to equal liberty is desirable, and so the outcome of public reason is accepted. I suggest that we work with this tendency, rather than against it. Furthermore, as I will argue immediately, public reason is only one facet of liberalism, the other being a strong commitment to religious freedom.

Liberty and equality call for the protection of religious freedom. This could be explained by repeating, to a certain extent, the debate regarding the translation of religious reasons into public reasons presented above. The most valued interest in a person's life is to lead the good life as the person sees it. Religion fulfils this goal for believers by informing conscience and identity: providing a moral theory and ideas about the world, the meaning of life, and the relationship between the person and others around her.⁷³

Rights, understood as basic interests that everyone has a reason to protect, provide public reasons to form laws and policies that uphold them. For this reason Rawls claims that "[t]he criterion of reciprocity is normally violated whenever basic liberties are denied", religious freedom being one of these basic liberties.⁷⁴ Rawls thus affirms that a realm of basic liberties is demanded by the idea of public reason itself.

The discussion above shows that not every request for accommodation of religious practices should be fulfilled. But it does not offer any principle to suggest *where* or *when* we should stop short of accommodation. My interest is in revealing exactly such a principle. To do so, more content has to be given to the notion of "choice" in the context of religious freedom.

What Costs Should be Borne by Religious Persons?

*Alberta v Hutterian Brethren of Wilson Colony*⁷⁵ is most helpful for the purpose of developing a principle regarding the appropriate extent of accommodation of religious practices. Like *R v NS*, *Hutterian Brethren* deals directly with the question of religious exemptions where others' rights are affected. The decision of McLachlin in *Hutterian Brethren* sensitively takes into account the interests at issue and balances the needs of religious persons and those of the public at large to create what I find to be a useful decision principle. After presenting McLachlin's ruling in *Hutterian Brethren*, I will argue that the correct application of this ruling in the case of *R v NS* would mean always allowing niqabi witnesses to testify wearing their niqab.

Hutterian Brethren involved a regulation of the Canadian province of Alberta imposing a requirement that all driving licences include a photograph and abolishing a previously existing

⁷³ *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at p 759, 35 DLR (4th) 1 at 759 (*per* Dickson CJ: The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.) See also Mike Madden, "Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence" (2010) 7:1 JL & Equality 57 at 59-63 [Madden].

⁷⁴ Rawls, *supra* note 69 at p 771.

⁷⁵ *Supra* note 4.

exemption for religious needs. The aim of the new regulation was to combat identity theft. The province proposed to lessen the impact of the new requirement by allowing the members of the Wilson Colony, Hutterites who “[sincerely] believe that the Second Commandment prohibits them from having their photograph willingly taken,”⁷⁶ to carry licence cards without a photo. But the province insisted that a photograph of all drivers be taken and placed in a data bank. The proposal was rejected by the members of the Wilson colony. Instead, they proposed that no photo of them be taken and that the driver's licence issued to them be deemed not a valid form of proof for identification purposes. The province rejected this proposal. The constitutionality of the regulation was then challenged by members of the Wilson Colony on the basis of freedom of religion.

McLachlin, delivering the majority decision, referred to the problem that religious freedom poses to the state, the same problem that the debate in *R v NS* implies. She said:

Freedom of religion presents a particular challenge in this respect because of the broad scope of the Charter guarantee. Much of the regulation of a 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, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.⁷⁷

McLachlin then moved to propose a balance that would allow both effective freedom of religion and effective discretion for the state to promote compelling public interests – interests in securing the rights of others – even when such promotion would adversely affect religious persons. The balance McLachlin offered differentiates between serious incidental effects on religious persons and less serious effects. She said:

The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice . . . Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law. . . The absence of a meaningful choice in such cases renders the impact of the limit very serious.

However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice

⁷⁶ *Ibid*, per McLachlin at para 7.

⁷⁷ *Ibid* at para 36.

concerning the religious practice at issue. The Charter guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.⁷⁸

McLachlin's ruling is important for the debate over religious freedom in that it assumes that religion is a choice subject to limitation, i.e. a private reason of no absolute or decisive power, and in that it offers a decision-making principle for requests for religious exemptions. The norm of religious freedom is taken by McLachlin to mean that sincere believers deserve to be able to practice their religion without bearing severe costs, and she offers a way to define severe costs.

In determining which costs effectively deprive religious adherents of a "meaningful choice" to practice their religion and which do not, McLachlin considered the kind of activity in which the religious person asks to participate while at the same time practicing her religion to the full extent. McLachlin referred in her decision to a number of examples, from compulsory legal requirements, to rules governing participation in the labour market, to rules applied in public education. In these examples, she found that non-accommodation of religious needs deprives the religious person of "a meaningful choice as to the religious practice."⁷⁹

In the case at hand, McLachlin found that a requirement to take a photograph in order to obtain a driver's licence did not deprive members of the Wilson Colony of "meaningful choice to follow or not to follow the edicts of their religion."⁸⁰ First, she found that there is no obligation in law to be photographed; being photographed is only a condition for participating in a chosen activity: driving. And "[d]riving automobiles on highways is not a right, but a privilege."⁸¹ Defining driving as a privilege highlights also the fact that driving is not a basic need. McLachlin set here a principle according to which when an activity is not a right, either because it is not mandated by law, or because it does not fulfill a basic need, the state is not obliged to assure equal access to it. McLachlin further highlighted the fact that the Hutterites had an alternative available to them: to hire others to drive for them. This alternative would uphold the general interest in security and the Hutterites' religious freedom without causing them the deleterious effects they claimed. The availability of such an alternative is another reason to define driving yourself as a privilege and not a right. For all these reasons McLachlin concluded that non-accommodation will not present the Hutterites with "an invidious choice: the choice between some of its members

⁷⁸ *Ibid* at paras 94-95.

⁷⁹ *Hutterian Brethren*, *supra* note 4, at para 96.

⁸⁰ *Ibid* at para 98.

⁸¹ *Ibid.* at para 97.

violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand.”⁸²

Defending the specific balance struck by McLachlin is beyond the scope of this article and is unnecessary for my purposes.⁸³ My claim is simply that the definition of “meaningful choice” made by McLachlin expresses the liberal notion of reciprocal rights. Mike Madden thinks that McLachlin’s statement that “many religious practices entail costs which society reasonably expects the adherents to bear”⁸⁴ suggests that

[T]he real issue in a religious freedom proportionality analysis is whether a majority of the larger societal population is willing to tolerate the claimants’ religious practice or belief – an idea that seems to run contrary to the purpose of entrenching a constitutional right to freedom of religion.⁸⁵

I disagree with this interpretation. Madden takes issue with McLachlin’s referral to “society” and interprets it to mean “the majority.” But the liberal reciprocity principle means that each and every member of society can reasonably expect adherents to bear some costs of their religious choices, including adherents themselves. Thus, McLachlin’s words do not convey the idea of a majority expressing limited willingness to tolerate religious practices. Rather, her words put in practical terms the consequences of a commitment to a liberal system of reciprocal rights. McLachlin’s discussion of a “meaningful choice” provides a workable principle to apply to all requests for accommodation of religious needs.

Applying the concept of a “meaningful choice to practice one’s religion” as it is presented in *Hutterian Brethren* to the case of *R v NS* shows that NS should have been allowed to testify wearing her niqab. NS has a basic interest in security of her person which, after an alleged assault has occurred, she can only enforce through testifying. Both NS’s interest in security of the person and her interest in access to justice are recognized as legal rights. Finally, NS may be obliged by law to testify.

⁸² *Ibid.*

⁸³ *Hutterian Brethren* is widely criticized. Whichever argumentative route commentators take, most of them find the decision unjust because they find that the claims to harm made by the Colony members were not adequately taken into consideration. Many commentators side with the dissenting opinion of Abella, who found that the adverse effect on Hutterites will be “dramatic” since the Colony members’ “inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community.” (*Ibid* at para 114.) But it should be noted that, although undeniably important to them, the autonomous character of their community was not claimed by the members to be motivated by a divine command.

⁸⁴ *Hutterian Brethren*, *supra* note 4, at para 95.

⁸⁵ Madden, *supra* note 73 at 76. For critiques of the decision see e.g. Sara Weinrib, “An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*” (2011) 56:3 McGill LJ 719 (A critique of the decision’s focus on the final step of the Oakes test); Madden, *supra* note 90 (A critique supporting Abella J’s dissenting opinion); Mark Witten, “Rationalist Influences in the Adjudication of Religious Freedoms in Canada” (2012) 32 WRLSI 91 (A critique of the majority’s failure to comprehend religious claims); Mathen, *supra* note 68 (Calling the case “a loss under section 2(a)”).

NS was compelled to approach the court by her assaulters when they allegedly violated her basic right to security of the person. Once her right was violated, the only way to fulfill her interest in her security of the person was by approaching the justice system and securing a remedy in the form of a trial and possible conviction.⁸⁶ NS has no available alternative for securing her interest in justice. The state has a monopoly over the legitimate use of force, punishment and the administration of justice. If NS wishes to secure her rights, her only avenue is approaching the court, and testifying. NS's is not a case of an "inability to access conditional benefits or privileges conferred by law" but a case of inability to access the fundamental rights of security of the person and access to justice.

Finally, once she reported the crime and a trial was set, NS was called to testify by the prosecution, and she may be required to provide her testimony.⁸⁷ This is an obligation by law which, according to the principle articulated by McLachlin, creates a right for equal access. NS's niqab should be accommodated because she did not choose to participate in the trial in more than one sense and because she has a right to participate in it.

McLachlin did not consider *R v NS* in terms of NS's meaningful choice to practice her religion. But her conclusion, that the deleterious effects of a requirement that NS unveil to testify would be less significant than the salutary effects on trial fairness, implies that McLachlin believes that a requirement to unveil will not deny NS such a meaningful choice. I think McLachlin believes that NS would still have a meaningful choice to practice her religion because she would only be required to unveil temporarily, for the duration of the testimony. And McLachlin seems to believe that the legal formula she defines means that such a restriction on the right to don the niqab will only occur rarely, where a niqabi woman is asked to provide contested evidence in court. But it is not the temporal element that determines whether a "meaningful choice" is left to the adherent, but rather the elements of voluntariness and entitlement. As Abella said:

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, as previously noted, may be no meaningful choice at all.⁸⁸

5. Conclusion

⁸⁶ See Natasha Bakht, "Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms" in Ralph Grillo et al eds, *Legal Practices and Cultural Diversity* (Farnham, England: Ashgate Publishing, 2009) 115 at 126.

⁸⁷ *Criminal Code*, RSC, 1985, c C-46 s 698 (Section 698. (1) provides: "Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence." Section 698. (2) allows a competent court to issue a warrant that person be arrested and brought to give evidence). See also the discussion of compelled testimonies in *R v S (RJ)*, [1995] 1 SCR 451, 121 DLR (4th) 589.

⁸⁸ *R v NS*, *supra* note 2 at para 96.

I presented the three opinions in *R v NS*, each informed by a distinctive, competing, approach to religious accommodation. McLachlin focused on individual rights, solving a conflict between them by balancing the salutary and deleterious effects of the limiting measure imposed. LeBel preferred a principled approach informed by the ideal of openness, and opted for a rule against accommodating the niqab in courts. Abella sought equal access to justice for niqabi witnesses, and opted for a rule accommodating the niqab in courts. The diversity of arguments *R v NS* offers provides a student of religious exemptions with the opportunity to consider the strength and weaknesses of different approaches to religious accommodation and exemptions.

I criticized LeBel's reasons for rejecting NS's request for exemption from the common law rule requiring open testimony, while allowing other witnesses such an exemption. His different treatment of the two groups relies on a misguided analysis, resulting in unjust discrimination against niqabi witnesses. Given the significance of the niqab to the witness, communication *will be* improved if the niqab is accommodated, and according to LeBel's own criteria such an accommodation should thus be extended. The critique further offered new reasons to accommodate the niqab in court. The witness is also an alleged victim who has the right to access justice. Her exclusion from court will mean that a whole public – niqabi women – will be more vulnerable to violations of their rights, and that potential violators of these rights will not be held accountable.

Having criticized LeBel's explicit arguments, I considered an argument that was implied in LeBel's reasons and that better supports both LeBel's concurring opinion and McLachlin's majority opinion. According to this argument, niqabi witnesses do not deserve the accommodations enjoyed by some other witnesses because unlike the latter, niqabi witnesses choose to don the niqab and can also choose to unveil. Their choice does not deserve the accommodation extended to unchosen circumstances. I argued against the conclusion of the case which rejected a request for religious exemption based on the finding that religious practice is a choice. I did so by analyzing the purpose and meaning of religious freedom in a liberal democracy. Religious practice is a choice that deserves accommodation, though not absolute priority over other considerations. Liberal principles support the idea that religious practitioners enjoy a meaningful choice to practice their religion. This means that religious practices should be accommodated in any secular activity that is mandated by law, that fulfills a basic need, and to which a reasonable alternative does not exist. The state is only justified in requiring religious practitioners to bear the costs of participating in secular activities outside this realm. A decision that demands that she violates a divine command in order to guaranty her basic rights – security of the person and access to justice – deprives a religious practitioner of a meaningful choice to practice her religion.