

Taking “Culture” out of Multiculturalism

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La tension entre la liberté de religion et les principes de non-discrimination devient de plus en plus aiguë. Les questions sur la meilleure façon d'équilibrer les deux droits reviennent avec une remarquable régularité. Le statut des femmes dans les politiques de multiculturalisme a fait l'objet de débats, car les questions reliées au genre mettent à l'épreuve les limites de la tolérance dans des pratiques comme le mariage de mineures et le port du voile. Dans les discours politiques, la « crise du multiculturalisme » est de plus en plus liée à l'égalité des sexes et au besoin de contrer l'inégalité des sexes, en particulier dans l'Islam. Les débats sur le genre dans les politiques concernant les différences culturelles servent simultanément à qualifier certains groupes de rétrogrades et de considérer la culture de la majorité comme la norme. Pendant ce temps, on occulte les vraies questions d'inégalité structurelle fondée sur le genre. J'examine ces questions par le biais du projet de loi 94 au Québec, qui cherchait à bannir le niqab de l'espace public. L'interdiction aurait touché pratiquement tous les établissements publics, dont les garderies et les établissements de santé publics. Le gouvernement défendait la loi en invoquant des principes d'égalité des sexes et de laïcité. Je défends une politique de multiculturalisme qui porte sur les inégalités structurelles et non sur les différences culturelles. En passant d'une politique de différence structurelle à une insistance sur les différences culturelles, on a éclipsé la question plus générale des inégalités structurelles: la pauvreté, le chômage et le racisme, tout en amplifiant les problèmes liés à la religion ou à la culture. Le multiculturalisme a encore un rôle important à jouer si l'on veut atteindre une plus grande égalité sociale. Il faut trouver de nouveaux moyens pour affronter les dilemmes que posent les questions de justice et d'égalité dans les sociétés multiculturelles; il faut reformuler le multiculturalisme plutôt que de l'abandonner.

The tension between religious freedom and non-discrimination principles is becoming increasingly acute. Questions about the appropriate way to balance the two rights arise with particular regularity. The status of women in multiculturalism policies has been the site for debate as gender issues test the limits of toleration

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through such practices as under-age marriage and veiling. In policy discourses, the “crisis of multiculturalism” is increasingly tied to gender equality concerns and the need to counter, in particular, the gender inequality in Islam. Debates about gender in the politics of cultural difference serve simultaneously to name certain communities as backward and majority culture as the norm. In the process, the real issues of gendered structural inequality are obscured. I examine these issues through the lens of the Bill 94 in Québec, which seeks to ban the niqab in public places. The ban would encompass nearly every public institution, including childcare centres and public health facilities. The government defended the law by invoking principles of gender equality and secularism. I argue for a multiculturalism policy that focuses on structural inequalities rather than on cultural difference. The shift from a politics of structural difference to an emphasis on cultural difference has obscured the larger issues of structural inequalities—poverty, unemployment, and racism—while simultaneously magnifying issues related to religion or culture. Multiculturalism still has an important role to play in achieving greater social equality. We need new ways of addressing dilemmas of justice and equality in multicultural societies as it is necessary to reformulate multiculturalism rather than to abandon it.

Introduction

The status of women in multiculturalism policies has been the site of controversy. Gender issues test the limits of toleration through such customs and practices as under-age marriage, honour killings, and wearing a *niqab* or *hijab*.¹ Since the events of 9/11 and the resultant fear of radical Islam, multiculturalism has been strongly criticized.² Those opposed to the recognition of minority rights through policies of multiculturalism have blamed it for encouraging the oppression of women. Positing women’s equality and minority rights as oppositional, the argument of gender equality is deployed to justify the retreat from multiculturalism,

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1. See, for example, Leti Volpp, “Feminism versus Multiculturalism” (2001) 101:5 *Columbia Law Review* 1181 at 1181; see also *Discover Canada: The Rights and Responsibilities of Citizenship* (Ottawa: Citizenship and Immigration Canada, 2011) at 9 (“In Canada, men and women are equal under the law. Canada’s openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, ‘honour killings,’ female genital mutilation, forced marriage or other gender-based violence. Those guilty of these crimes are severely punished under Canada’s criminal laws”); Iris M Young, “Structural Injustice and the Politics of Difference” in Anthony Simon Laden and David Owen, eds, *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007) at 87.
 2. See, for example, Sherene H Razack, “The Sharia Law Debate in Ontario: The Modernity/Pre-Modernity Distinction in Legal Efforts to Protect Women from Culture” (2007) 15:1 *Feminist Legal Studies* 3; 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 54-5.

and progressive equality agendas are subverted to reinforce cultural essentialism.³ Debates about gender in the politics of cultural difference serve simultaneously to name certain communities as backward or barbaric and to name majority culture as the norm.⁴ In the process, the real issues of gendered structural inequality are obscured.⁵

Drawing from the work of Iris Young, this article examines the question of whether and to what extent justice requires attending to, rather than ignoring, group differences in our discussion of the justice of minority claims.⁶ I argue that to respond to exclusion and disadvantage we cannot rely on difference-blind remedies because so many norms, rules, and policies of majority institutions are based on the normative values of the majority, with differing impact on groups.⁷ The challenge for pluralist states is not whether the state should have an explicit policy of multiculturalism but, rather, what kinds of considerations should the state keep in mind when formulating its policy of multiculturalism. The larger question is what sort of policy of multiculturalism is most just and effective in securing minority rights and can affirm and recognize both the collective aspects and individual aspects of citizenship.⁸

In the first part of this article, I begin with a theoretical situating of multiculturalism. I discuss the similarities and differences between a politics of cultural difference and structural difference. I argue that multiculturalism polices should take into account inequalities that arise from structural disadvantage and should move away from a central focus on cultural difference. In the second part, focusing on recent cases, I review Supreme Court of Canada jurisprudence to evaluate the extent to which multiculturalism has played a part as an interpretive tool, helping judges interpret rights. Multiculturalism is a constitutional value that recognizes Canada's multicultural heritage.⁹ It animates the recognition of group rights and is an interpretive tool for judges to use when adjudicating rights. It is understood as a state policy that recognizes the plurality and diversity of Canada's population. The

3. See, for example, Susan Moller Okin, "Is Multiculturalism Bad for Women?" *Boston Review* (October/November 1997) *Boston Review* <<http://new.bostonreview.net/BR22.5/okin.html>>; Will Kymlicka, "The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies" (2010) 61:199 *International Social Science Journal* 97; Will Kymlicka, "Multicultural Odysseys" (2007) 6:4 *Ethnopolitics* 585; Christian Joppke, "The Retreat of Multiculturalism in the Liberal State: Theory and Policy" (2004) 55:2 *British Journal of Sociology* 237.

4. Volpp, *supra* note 1 at 1182; Young, *supra* note 1 at 88.

5. This point is illustrated by the reasonable accommodation debates in Québec where much time was spent on cultural practices but little time on gendered structural difference or racialized gender inequality in attempts to ban the *niqab*.

6. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).

7. Young, *supra* note 1 at 74; Kymlicka, *supra* note 2 at 46.

8. Kymlicka, *supra* note 2 at 46.

9. See, for example, *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 s 27 [Charter].

principle of multiculturalism has particularly arisen in the context of religious freedom concerns. In cases culminating with *Multani v Commission scolaire Marguerite-Bourgeoys*, the Supreme Court of Canada has displayed an understanding of religious freedom that is sympathetic to a broad and generous interpretation both of equality and multiculturalism.¹⁰ However, with the decision in *Alberta v Hutterian Brethren of Wilson Colony*, it appears to have retreated from this generous interpretation of minority claims to religious difference.¹¹ I conclude in the third part by considering issues of the formulation of public policy and the recognition of difference through the lens of Québec's Bill 94, which seeks to restrict the wearing of a *niqab*.¹² I examine the ways in which legislative initiatives such as Bill 94 reflect the persistence of colonial and Orientalist discourses whereby the liberal state justifies its intervention to save "native" women from their barbaric, outdated customs.¹³

Cultural Differences and Structural Inequality

Iris Young argues that there are at least two kinds of politics of difference—a politics of cultural difference and a politics of structural difference.¹⁴ She questions the equivalence created between a politics of difference and an identity politics. The politics of cultural difference, rather than a politics of structural difference, predominates in the debate of political theorists. There has been a shift away from a politics of structural difference to an emphasis on cultural difference—from issue-based politics to an ascriptive identity-based politics. Young expresses concern that the shift from a politics of positional difference to an emphasis on cultural difference has obscured the larger issues of justice such as structural inequalities to focus instead on cultural differences. The effect has been to narrow the groups of concern to ethnic and religious groups, while limiting the issues of justice at stake. She calls for a refocusing of the politics of difference on structural difference that arises from inequalities in structural power.¹⁵

There are certain similarities between the politics of structural difference and the politics of cultural difference.¹⁶ Challenging the difference-blind principle, both agree that public institutions must be required to notice group difference and to

10. *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].

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

12. A form of veiling that leaves only the eyes exposed.

13. See, for example, 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, UK: MacMillan Education, 1988) 271.

14. Young, *supra* note 1 at 74.

15. *Ibid* at 88.

16. *Ibid*.

respond to this difference to promote equality because so many norms, rules, and policies of majority institutions are based on the normative values of the majority with differing impact on groups. Justice entails sometimes noticing social or cultural difference and treating individuals and groups differently.¹⁷ It follows that policies and state initiatives to accommodate difference must be based on attending to such differences within law, public policy, and social and economic and political institutions rather than ignoring them.

Nevertheless, there are notable differences between a politics of structural difference and a politics of cultural difference. Structural difference is concerned primarily with inequalities that arise out of structural disadvantage, where the position of their group limits members' participation in social and public institutions. Young notes that culturally based inequalities arise when groups or individuals within a group bear a significant cost—economic or political—in trying to maintain or pursue a different or distinct life style.¹⁸ The politics of cultural difference, on the other hand, is more concerned with public accommodation to support these cultural differences.¹⁹

A policy based on cultural difference—and the politics around it—means that the focus is on what is permissible by the state and what is not—the *kirpan*, *hijab*, *get*, or sharia law. Public debate on issues such as whether headscarves should be allowed seems to displace structural problems onto issues of culture. These debates tend to ignore issues of racism, poverty, unemployment, poor education, and access to justice while simultaneously magnifying issues related to religion and culture.²⁰ In thinking about cultural difference and justice, the focus is on issues of liberty, and thus structural inequalities such as inequalities in employment opportunities, in norms, and in standards of institutions as well as economic inequalities get obscured. A politics of structural difference, by contrast, focuses on issues of exclusion and inclusion and on how norms and standards may result in perpetuating systemic inequality.²¹

For a policy of multiculturalism to be effective, it must also refocus on exclusions that result from structural inequalities not just on those exclusions that result from cultural difference. A policy that focuses exclusively on cultural difference, and support of such a policy, becomes little more than cultural critique rather than an assertive policy of anti-racism. The challenge remains how best to accommodate minority claims. What is required in terms of accommodation to give public recognition to group difference? Certainly, each position, cultural difference, and structural difference is important, and each makes a contribution to the debate on how to accommodate minority rights. Cultural difference theory is helpful as it can reduce ethnic religious violence by responding to dominant nationalism by recognizing distinct cultures and practices. Paying attention to structural difference is

17. *Ibid* at 62.

18. *Ibid* at 63.

19. *Ibid* at 61.

20. *Ibid* at 83.

21. *Ibid* at 79.

important because it highlights the depth and systemic basis of inequality. It calls to attention relations and processes of exploitation, marginalization, and normalization that keep many people and groups in subordinate positions. Indeed, sometimes the two positions can blend as in the understanding of cultural difference superimposed on structuralized racial inequality.²²

The multiculturalism debate focuses on what aspects of difference may be accommodated and what aspects should not be.²³ As a result, the notion is that while some things will be tolerated, others will not, so that the debate is also about the limits of toleration.²⁴ However, the difficulty with framing the debate in this way is that it introduces an idea of the normalizing of culture, where certain norms and cultural practices are accepted as the norm and the yardstick against which “other” cultural values must be measured. It is the “we” who debate these questions of accommodation of dress codes or food habits, among others, such that majority practices are “normalized” while racialized minorities have little voice in these discussions.²⁵

The idea here is not to reject the politics of cultural difference. Rather, as Nancy Fraser points out, the idea is to emphasize the “importance of group difference arising not only from cultural difference but also from structural disadvantage of race, gender, religious difference and the way in which we construct ideas of normal and deviant and ultimately the way these mediate tensions between minority groups and the wider society.”²⁶ Fraser’s argument is useful in rejecting the opposition between redistribution and recognition, acknowledging that an either/or choice between redistribution and recognition, multiculturalism, and social equality is not particularly helpful. Fraser writes:

[J]ustice today requires *both* redistribution *and* recognition, as neither alone is sufficient. As soon as one embraces this thesis, however, the question of how to combine them becomes paramount. I shall argue that the emancipatory aspects of the two problematics should be integrated in a single, comprehensive framework. Theoretically, the task is to devise a “bivalent” conception of justice that can accommodate both defensible claims for social equality and defensible claims for the recognition of difference. Practically, the task is to devise a programmatic political orientation that integrates the best of the politics of redistribution with the best of the politics of recognition.²⁷

22. *Ibid* at 62-3.

23. *Ibid* at 84-6.

24. *Ibid* at 86.

25. *Ibid* at 87.

26. *Ibid* at 60.

27. Nancy Fraser, “Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation” (Tanner Lectures on Human Values, delivered at Stanford University, 30 April–2 May 1996) [unpublished].

In an effort to blend a notion of communitarianism with liberal theory, Will Kymlicka attempts to recover some aspects of culture in the accommodation of difference.²⁸ He argues that liberal societies must not accommodate those illiberal practices that violate the larger society's ideas of human rights and ideologies of equality.²⁹ His framework of external restrictions and internal restrictions provides a very useful starting point for the discussion on which aspects of difference ought to be accommodated and which ought not to be.³⁰ Kymlicka underscores the importance of cultural membership and the related importance for liberal democracies to affirm and recognize these compelling interests related to culture and identity.³¹ Naming it the "liberal-culturalist" position, he asserts that such protection of culture is not inconsistent with liberal principles of freedom and equality.³² He refers to the culture of mainstream society as the "societal culture" and notes the difference between minority groups and this larger culture.³³ Understanding that societal cultures involve more than one culture within a nation, the question that arises is what is required in terms of accommodation in order to give public recognition to cultural diversity.

This manner of reconciling cultural difference within pluralist societies and the limits of toleration has been challenged. Joseph Carens is critical of Kymlicka's apparent assumption of the societal culture as the nation state, even though Kymlicka asserts there is no one societal culture within a nation.³⁴ Nevertheless, extending this logic of the singular nation state may lead Kymlicka to see groups also define themselves by a singular understanding of themselves. Such an understanding raises the concern of essentializing cultural difference and risks seeing cultures as unchanging and fixed. Arguably, we need to have a more dynamic understanding of culture and of what constitutes the cultures both of mainstream society as well as of minority, racialized communities. Societal culture implicates "other" minority cultures as being alien to universal values. An interesting example is the recent *Canadian Citizenship Guide*, which notes the need to integrate new citizens, emphasizing common Canadian values and asserting the importance of cohesion, exhorting new citizens to adapt themselves.³⁵ This kind of exhortation is justified as being necessary for citizenship training for new immigrants to understand the importance of adhering to "core Canadian" values of democracy and the rule of law.³⁶

28. Kymlicka, *supra* note 2 at 49.

29. *Ibid* at 54.

30. *Ibid* at 34-7.

31. *Ibid* at 31; see also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 34-49.

32. Kymlicka, *supra* note 2 at 31.

33. *Ibid* at 34-5.

34. Joseph H Carens, *Culture, Citizenship and Community: A Contextual Explication of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000) at 52-87.

35. *Discover Canada*, *supra* note 1.

36. Phillips, first unnumbered note at 23.

The implicit premise is that these ideas will not be familiar to immigrants, and it draws on particular stereotypical dichotomies between East and West, illiberal and liberal, Western and non-Western cultures as well as tradition and modernity.³⁷

The refusal to problematize culture has contributed to a reification of stereotypical views of racialized minority groups. Members of these groups are seen as profoundly different, not just in practices, but also in their beliefs and values. This stereotyping has in turn contributed to the understanding of critics of multiculturalism that minority groups are inherently opposed to the ideologies and values of the Canadian liberal democratic state and that loyalty to their group culture precludes loyalty to shared Canadian values.³⁸ This misrepresentation of cultural difference as a threat to political stability is far too simplistic an understanding of culture—group loyalty should not be understood as oppositional to national loyalty.³⁹ As Anne Phillips notes,

[b]ut insofar as it starts from the unquestioned “fact” of cultural difference, multiculturalism tends to call up its own stereotypes, categorizing people in ways that simplify differences, emphasize typical features, and suggest defining characteristics of each cultural group. This intentionally promotes a view of individuals from minority and non-Western cultural groups as guided by different norms and values, and inadvertently fuels a perception of them as driven by illiberal and undemocratic norms.⁴⁰

A state-imposed, top-down multiculturalism serves to box people into predetermined groups, with no acknowledgement of the fluidity of identities or the reality of multiple and overlapping allegiances. Culture in such a static understanding is presumed by the state to be the main oppositional force for members of minority racialized groups. Phillips emphasizes the need to problematize the notion of culture at the heart of official policies of multiculturalism—a notion of culture that is “a falsely homogenizing reification.”⁴¹ This notion of culture emphasizes the internal unity of the group, rejects dissent within the groups, and results in essentializing members of the culture into stereotypes, making cultural communities seem more distinct and separate from the mainstream than they actually are. As a result, “[m]ulticulturalism then appears not as a cultural liberator but as a cultural strait-jacket forcing those described as members of a minority cultural group into a regime of authenticity, denying them the chance to cross cultural borders, borrow cultural influences, define and redefine themselves.”⁴²

37. *Ibid.*

38. *Ibid* at 23-4.

39. *Ibid* at 20-2.

40. *Ibid* at 31.

41. *Ibid* at 14.

42. *Ibid.*

An uncritical conception of multiculturalism assumes “Other” minority cultures to be homogenous and undifferentiated. It does not acknowledge the hybridity of cultures or that norms are formed and created in cross-cultural dialogue and insists thereby on the starting point of negotiations and dialogue as between distinct cultures.⁴³ The construction of group identity too should be understood as a discursive process, one that is negotiated, selectively reinvented, and forwarded to suit particular social and political purposes.⁴⁴ Group identity is shaped in response to official policies of multiculturalism, whereby minority groups have to frame themselves in particular ways in order to receive state benefits and patronage. Inevitably, this raises questions regarding the nature of such groups and issues of representation and authenticity. This notion of multiculturalism is a demonstration of what Michel Foucault terms “governmentality,” whereby cultural communities are slotted by the state within certain easily recognizable boundaries, which help easily “manage” minority groups.⁴⁵

The idea of taking culture out of multiculturalism is not facetious. We need to think more carefully about multiculturalism as a policy of inclusive equality and anti-racism, while retaining a critical stance towards claims to a pure cultural authenticity. Problematizing culture is crucial to better understand how dichotomous understandings of East/West, modernity/tradition, and culture/gender equality reify and justify state intervention. As Phillips writes,

[m]y object, however, is a multiculturalism without culture: a multiculturalism that dispenses with the reified notions of culture that feed those stereotypes to which so many feminists have objected, yet retains enough robustness to address inequalities between cultural groups; a multiculturalism in which the language of cultural difference no longer gives hostages to fortune or sustenance to racists, but also no longer paralyses normative judgment. I maintain that those writing on multiculturalism (supporters as well as critics) have exaggerated not only the unity and solidarity of cultures but also the intractability of value conflict as well, and often misrecognised highly contextual political dilemmas as if these reflected deep value disagreement. Most do not involve a deep divergence with respect to ethical principles and many are more comparable to disputes that take place within cultural groups.⁴⁶

43. *Ibid* at 162-3.

44. See, for example, Vrinda Narain, *Gender and Community: Muslim Women's Rights in India* (Toronto: University of Toronto Press, 2001).

45. Michel Foucault developed the notion of “governmentality” to denote the way in which the state governed and managed populations in a top-down manner, linking state power and subordination in his lectures developed in the College de France between 1977 and 1984. See, for example, Thomas Lemke, “Foucault, Governmentality and Critique” (2002) 14:3 *Journal of Economics, Culture and Society* 49. See also Kim McKee, “Post-Foucauldian Governmentality: What Does It Offer Critical Social Policy Analysis?” (2009) 29:3 *Critical Social Policy* 465 at 466-7.

46. Phillips, first unnumbered note at 8.

Mainstream society is not subject to the same scrutiny and is presented, in opposition to minority groups, as culture free. Abdullahi An Na'im insists that mainstream society must turn the gaze on itself to acknowledge and condemn gender discrimination.⁴⁷ An Na'im, while acknowledging that nearly all cultures discriminate against women, especially many of the minority cultures on behalf of whom group rights claims are being made, insists that in order to enforce gender equality, discrimination on grounds of religion, race, language, or national origin must be avoided.⁴⁸

Seyla Benhabib notes that the response to what James Tully has called "strange multiplicity" has pushed "particular notions of culture uninterrogated to the forefront of political discourse."⁴⁹ Consequently, there has been a reification of group identities as given and a failure to problematize the notion of culture, both of which contribute to a multiculturalist policy that risks rigidifying group differences.⁵⁰ In contrast to this static understanding of cultures, Benhabib and Bhikhu Parekh offer a dialogic view of cultures, rejecting the notion of cultures as fixed and ahistoric and seeing them instead as fluid and responding to change.⁵¹ Such a dynamic view, which sees cultures as engaging in cross-cultural dialogue, allows for the possibility of cross-cultural interaction to resolve conflict. The dialogic process is arguably a better response to perceived oppositions between mainstream values and group difference. Phillips suggests the dialogic process as an alternative to legislative regulation, noting that

the objection to regulation is that it is insufficiently sensitive to cultural difference, that it conflates all minority cultures, a third possibility apart from enforcing the right to exit—which is considered as imposing the burden on the individual to be able to exit and legislative regulation is that of cultural dialogue—as a way of promoting intercultural understanding.⁵²

At the same time, this cross-cultural dialogic approach itself has difficulties, resulting in the paradox of multicultural vulnerability where it is the more powerful members of minority communities who are accepted by the state as the representatives of the group. Women's equality rights are presented as oppositional to group rights. Even where women's interests and rights are being debated, women are not

47. See, for example, Bhikhu Parekh, "A Varied Moral World" in Joshua Cohen, Matthew Howard, and Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1997) 69 at 70.

48. Abdullahi An Na'im, "Promises We Should All Keep in Common Cause" in Cohen, Howard, and Nussbaum, *supra* note 47, 59 at 60.

49. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002) at viii. See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

50. Benhabib, *supra* note 49 at ix-x.

51. Parekh, *supra* note 47 at 69.

52. Phillips, first unnumbered note at 160.

part of the discussion or debate—their views are not acknowledged or reflected. In turn, this situation raises the issues of authenticity, representation, and the definition of group interests that feminists have been challenging.⁵³ The notion of a more inclusive public space dialogue—a modification of the Habermasian notion of dialogic engagement—is one response to this difficulty of group representation and the legitimate articulation of group interests.⁵⁴ However, granting group rights to undemocratic unrepresentative leaders, where marginalized groups within the minority do not have a voice, is dangerous.⁵⁵ Yet this rejection of essentializing and stereotyping does not lead to the conclusion that we must remain silent in the face of oppression or that women living within traditional societies are not aware of gender disadvantage or patriarchal privilege.

A conception of justice able to criticize relations of domination and limitation of opportunity suffered by gender, racialized, or ethnic or religious groups must consider relations within private activities and civil society and their interaction with state institutions. Young insists that the state ought not to be the central focus of minority groups in seeking equality and inclusion in the political community, and she emphasizes the importance also of engagement with civil society.⁵⁶ Benhabib articulates an interesting notion of a deliberative democratic model that accepts “maximum cultural contestation within the public sphere, in and through the institutions and associations of civil society.”⁵⁷ The understanding that “[c]ultures are formed through complex dialogues with other cultures” challenges claims to a pure cultural authenticity.⁵⁸ Benhabib notes that “cultures are complex human practices . . . which are internally riven by conflicting narratives, raising questions of representation, authenticity, and organization.”⁵⁹ Once we accept the reality of internal dissension within cultures and the hybridity of cultural practices, then those struggles for recognition that challenge hierarchy and exclusivity of existing cultural arrangements are deserving of democratic support.⁶⁰

Rather than a policy of multiculturalism focused on the limits of toleration where the “us” continue to decide for the “them” which aspects of their culture are to be accommodated and which are not to be, it is necessary to craft a policy of critical multiculturalism that respects immigrants’ contributions to society rather than simply tolerating “other” illiberal practices.⁶¹ From a pragmatic perspective, these decisions of accommodation through the crafting of public policy have to be taken,

53. Narain, *supra* note 44.

54. See, for example, Vrinda Narain, *Reclaiming the Nation: Muslim Women and the Law in India* (Toronto: University of Toronto Press, 2008).

55. Phillips, first unnumbered note at 161.

56. Young, *supra* note 1 at 83.

57. Benhabib, *supra* note 49 at ix.

58. *Ibid.*

59. *Ibid* at ix- x.

60. *Ibid* at ix.

61. Young, *supra* note 1 at 87-8.

and it falls to the state through legislative enactment and the judiciary through constitutional interpretation to delineate the limits of religious freedom and to manage ethno-cultural diversity while upholding universal norms such as equality, liberty, and democratic participation.⁶² Multiculturalism still has an important role to play in achieving greater social equality, but we need new ways of addressing questions of justice and equality in pluralistic societies. It is necessary to reformulate multiculturalism, allowing it to “generate radically novel ways of conceptualizing and structuring” public policies rather than to abandon it.⁶³

The Intersection of Multiculturalism, Equality, and Religious Freedom

Questions of the status of women in multiculturalism policies arise in the context of Canada’s commitment to protecting group life. In this part of the article, I will examine the legal framework in which group difference is addressed. Not surprisingly, the idea of multiculturalism and the recognition of difference are explicitly present in the jurisprudence around religious freedom, under section 2(a) of the *Canadian Charter of Rights and Freedoms*,⁶⁴ under the value of multiculturalism as articulated in section 27,⁶⁵ as well as in the guarantee of equality wherein religion is one of the grounds of discrimination expressly prohibited under section 15.⁶⁶ Section 27 provides that the rights guaranteed in the *Charter* will be interpreted in the context of Canada’s multicultural reality. While not a right, multiculturalism as a constitutional value is an interpretive tool to help determine how courts apply and determine rights.⁶⁷

At the intersection of multiculturalism, equality concerns, and religious freedom, a number of questions arise. What should be done when minority claims for accommodation conflict with mainstream norms of gender equality? How should the principles of substantive equality be applied when considering the complexities of the rights of individuals, particularly women, within religious and cultural minorities? To craft legal remedies to protect equality rights in the context of religious freedom requires respecting values of gender equality and religious freedom, without privileging one

62. See, for example, Richard Moon, “Liberty, Neutrality, and Inclusion: Religious Freedom under the *Canadian Charter of Rights and Freedoms*” (2002) 41:3 *Brandeis Law Journal* 2 at 573.

63. Parekh, *supra* note 47 at 75.

64. *Charter*, *supra* note 9 at s 2(a) (“Everyone has the following fundamental freedoms: (a) freedom of conscience and religion”).

65. *Ibid* at s 27 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”).

66. *Ibid* at s 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”).

67. *Ibid* at s 27.

or the other. To do so requires moving away from simplistic, oppositional understandings of women's substantive equality and minority rights. An uncritical policy of multiculturalism (mis)understands distinct belief systems as being in conflict with Canadian constitutional principles.⁶⁸ As a result, legislative initiatives such as Bill 94 may include measures that actually limit, rather than enhance, individual rights, as when restrictions on the use of religious dress in public settings are portrayed as necessary to counter, in particular, gender inequality in Islam.

In order to better understand how Canadian law has responded to difference, a good starting point is religious freedom jurisprudence. The constitutional treatment of religious freedom has critical implications for minority group rights, the equality debate, and the formulation of public policy.⁶⁹ It influences the way in which diversity is understood as public policies can easily reflect and privilege the religious and ideological norms of the majority. Moreover, even policies that may appear to be secular might well reflect a particular majority religion understanding that could violate minority religious tenets.⁷⁰

In recent years, religious claimants in Canada have been making wide claims for freedom from mainstream norms and the court has hitherto shown a generous reasonable accommodation approach to interpreting this right.⁷¹ In *Syndicat Northcrest v Amselem*, the Supreme Court of Canada specified that the state could not rule on religious dogma.⁷² In *Multani*, the Court was emphatic about its message of multiculturalism, reasonable accommodation, and religious freedom, which were seen as fundamental organizing principles of Canadian life.⁷³ However, with the decision in *Hutterian Brethren*, the Court has signalled greater deference to secular, government objectives in limiting religious freedom and a move away from the understanding of reasonable accommodation as articulated in *Multani*.⁷⁴

Benjamin Berger questions the conventional Canadian constitutional narrative, which posits religious freedom through section 2(a) of the *Charter* as demonstrating Canada's commitment to multiculturalism, with the law as the site for the recognition and accommodation of difference.⁷⁵ Berger suggests that the outcome is rather more ambivalent than an unequivocal support for religious freedom claims.

68. See, for example, Azizah Y Al Hibri, "Is Western Patriarchal Feminism Good for Third World/Minority Women?" in Cohen, Howard, and Nussbaum, *supra* note 47, 41 at 41.

69. See, for example, Shannon Ishiyama Smithey, "Religious Freedoms and Equality Concerns under the Canadian Charter of Rights and Freedoms" (2001) 34:1 Canadian Journal of Political Science 85 at 88.

70. *Ibid.*

71. See, for example, Moon, *supra* note 62 at 565; Smithey, *supra* note 69 at 88; Terrance S Carter and Anne-Marie Langan, "Canadian Supreme Court Gives Strong Endorsement to Freedom of Religion" (2006) 4:2 International Journal of Civil Society Law 93 at 93.

72. *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50, [2004] 2 SCR 551 [*Amselem*].

73. *Multani*, *supra* note 10 at paras 71, 78.

74. *Hutterian Brethren*, *supra* note 11 at paras 66-71.

75. Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall Law Journal 277 at 279.

Essentially, from *R v Big M Drug Mart Ltd* to *Amselem*, the jurisprudence shows that Canadian constitutionalism interprets religion as fundamentally individual and, in so doing, obscures the group dimension of religion as a valued public good.⁷⁶ According to Berger, this understanding fits in well with a modern, secular constitutionalism that is informed by liberal individualism.⁷⁷ The conception that religion must be protected as an expression of personal autonomy, liberty, and free choice predominates in the understanding and interpretation of religious freedom. We see this position emphasized in *Big M* where Justice Brian Dickson, as he was then, stated: “The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses.”⁷⁸

Significantly, the language of equality and identity mediates the tension between religious freedom, choice, and the reiteration of the public/private split. Ideas of equality are implicit in section 2(a) where the Supreme Court of Canada has held that all religions must be treated equally as we see in cases from *Big M* to *Multani*.⁷⁹ There is recognition of group equality rights in *Big M*, where the Court notes the importance of not discriminating between Christians and non-Christians. As stated by the Court, “[w]hat may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of “the tyranny of the majority.”⁸⁰

Thus, *Big M* asserts the language of equality to interpret freedom of religion. However, concepts of equality and identity in religious freedom are not well articulated in terms of collective rights. Greater emphasis appears to be placed on choice rather than on identity, and equality and identity are seen as markers of this choice.⁸¹ *Big M* affirms autonomy and dignity, both of which have informed the Court’s interpretation of the equality guarantee.⁸²

Since *Big M*, the jurisprudential message has been that religion has constitutional relevance because it is an expression of an individual’s autonomy and choice. Religion is understood as belonging in the private sphere where belief and faith take precedence over reason and debate, which are seen as belonging in the secular public sphere. Constitutional jurisprudence reflects the public-private split. As in *Amselem*, religion is defined as fundamentally a question of personal belief and convictions. In *Trinity Western University v College of Teachers*, the Court tried to resolve the apparent conflict between equality and religious freedom by properly

76. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at paras 120-3, 18 DLR (4th) 321 [*Big M*]; *Amselem*, *supra* note 72 at para 56.

77. Berger, *supra* note 75 at 283.

78. *Big M*, *supra* note 76 at para 94.

79. See, for example, Carissima Mathen, “What Religious Freedom Jurisprudence Reveals about Equality” (2009) 6:2 *Journal of Law and Equality* 163 at 180.

80. *Big M*, *supra* note 76 at para 95.

81. Berger, *supra* note 75.

82. Mathen, *supra* note 79 at 179.

defining the scope of rights. This effort involved, in part, drawing a line between belief and conduct, such that a belief is protected but not its public manifestation in conduct, which imposes on the public realm.⁸³ As belief only, religion is associated with, and protected in, the private sphere.⁸⁴ Certainly, this is a complicated question in itself regarding what aspects of manifestations of religious belief are acceptable within the public sphere—the wearing of a *kirpan* or a *hijab*, for example. In the context of Bill 94, the restriction on the wearing of a *niqab* in the public sphere can be understood as a demonstration of this impulse of the legislature to regulate the manifestation of religious beliefs in public spaces. The *niqab* is seen as a public manifestation of private belief, and, as such, it challenges the public/private split, which is in turn premised on a secular/religious binary.⁸⁵

The idea of multiculturalism and the recognition of difference are explicitly present in the jurisprudence around religious freedom most notably in the *Multani* case.⁸⁶ *Multani* is noteworthy for its emphasis on equality and multiculturalism as interpretive principles for better understanding religious freedom. As observed by the Court,

the argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict is not only contradicted by the evidence regarding the symbolic nature of the kirpan, but is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism. Religious tolerance is a very important value of Canadian society. If some students consider it unfair that G may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is at the very foundation of our democracy. A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. Accommodating G and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.⁸⁷

83. *Trinity Western University v College of Teachers*, 2001 SCC 31 at paras 35-8, [2001] 1 SCR 772 [*Trinity Western*].

84. Berger, *supra* note 75 at 308.

85. See, for example, Joan Wallach Scott, *Politics of the Veil* (Princeton, NJ: Princeton University Press, 2010) 21.

86. *Multani*, *supra* note 10.

87. *Ibid* at headnote.

This acknowledgement of the importance of recognizing Canada's diversity is immediately qualified by the assertion that only certain aspects of difference are to be recognized and accommodated, when they are balanced against countervailing *Charter* values.⁸⁸ However, who decides which aspects of difference are to be accommodated? The Court is careful to explain that the state policy of the accommodation of difference is one that must take into consideration basic Canadian constitutional values and that the right to religious freedom is not absolute.⁸⁹ The assertion of a right based on difference must not contradict a more pressing public interest. This has been the consistent guiding principle in the adjudication of religious freedom cases where a religious minority seeks an exemption from the secular or general requirements of the larger society.⁹⁰

An important case is *Bruker v Marcovitz* in which questions of religious freedom, multiculturalism, and gender equality converged.⁹¹ *Bruker* is a multilayered, complex case in which the Court had to consider the use of religious freedom to evade obligations under the secular law, where a husband refused to grant his wife the *get*, despite an agreement to do so. Under Jewish law, a divorce is not complete until the wife obtains a *get* from her husband. The *get* must be given freely by the husband, it cannot be mandated. Without the *get*, the wife suffers serious consequences, primarily that she is not considered divorced from her husband and therefore cannot remarry. As well, any children she may have will be considered illegitimate under Jewish law. By contrast, the husband suffers no penalties for refusing to give the *get*.⁹²

Bruker illustrates the dilemma for women of faith who are often presented with an either/or choice between their religious identity and their rights as Canadian women. This decision emphasizes the centrality both of multiculturalism and the principle of gender equality in adjudicating claims of religious difference. For the purposes of this article, it is noteworthy that the majority asserted that religious freedom cases must be approached on a contextual fact-by-fact basis and in the context of fundamental Canadian values. In asserting that religious freedom must be balanced with countervailing rights, including the extent to which it is compatible with Canada's fundamental values, the majority claimed:

Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is at the same time a delicate

88. *Ibid* at paras 26-30.

89. *Ibid* at paras 24, 30.

90. See, for example, Smithey, *supra* note 69 at 98.

91. *Bruker v Marcovitz* 2007 SCC 54 at para 70, [2007] 3 SCR 607 [*Bruker*].

92. For a complete discussion of this case, see Rosalie Jukier and Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What Should We 'Get' Out of *Bruker v Marcovitz*?" (2008) 43 Supreme Court Law Review (2d) 381.

necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.⁹³

Despite *Amsellem*, the majority in this decision held that the husband could not use religious freedom as a shield against meeting his contractual obligations.⁹⁴ According to the Court, the fact that there was a religious aspect to the contractual agreement did not preclude the court from adjudicating the matter. According to Justice Rosalie Abella, the Court had to consider the public policies of “equality, religious freedom and autonomous choice in marriage and divorce.”⁹⁵

The dissent, however, expressed discomfort with a secular court deciding matters of religious law.⁹⁶ Noting that the principles of state neutrality and secularism precluded such a trespass into the religious sphere, according to the dissenting opinion:

If the violation of a religious undertaking corresponds to a violation of a civil obligation, the courts can play their civic role. But they must not be put in a position in which they have to sanction the violation of religious rights. The courts may not use their secular power to penalize a refusal to consent to a get, failure to pay the Islamic mahr, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays etc. Limiting the courts’ role to applying civil rules is the clearest position and one that is most consistent with the neutrality of the state in Canadian and Quebec law.⁹⁷

However, such a hands-off policy might result in neglecting the interests of women of faith, which was in fact the concern of the majority. Moreover, such an approach fails to recognize the disproportionate disadvantage borne by women of cultural communities who wish to remain within their culture and religion but are disadvantaged in comparison with other Canadian women. For Muslim women who wear the *niqab*, Bill 94 would require women of faith to choose between either acting in accordance with their faith or risking a loss of their access to public services.

Next, in *Hutterian Brethren*, the Supreme Court of Canada considered the constitutionality of the universal photograph requirement in order to obtain driver’s licenses from which Hutterians sought an exemption on the basis of religious freedom. At issue was whether section 14(1)(b) of Alberta’s *Operator Licensing and Vehicle Control Regulation*⁹⁸ was a reasonable limit on freedom of religion

93. *Bruker*, *supra* note 91.

94. *Ibid* at para 2; Peter W Hogg, *Constitutional Law of Canada*, 2012 Student Edition (Toronto: Carswell, 2012) at 42-14.

95. *Bruker*, *supra* note 91 at para 80.

96. *Ibid* at para 130.

97. *Ibid* at para 184.

98. *Operator Licensing and Vehicle Control Regulation*, Alta Reg 137/2003, s 14(1)(b).

as guaranteed by the *Charter*.⁹⁹ The main question for consideration was not whether there was a breach of religious freedom but, rather, what were the constitutional limits on this right. This case is significant because it tells us about the Court's approach to balancing competing state objectives and constitutional rights. The majority decision, written by Chief Justice Beverley McLachlin, is arguably a restrictive understanding of religious freedom that lays more emphasis on state objectives in limiting constitutional rights than on upholding the right itself. In a split four-to-three decision, the Court held that the infringement of the right to religious freedom in this case satisfied the conditions of the *R v Oakes* test and that the government was justified in requiring the photograph.¹⁰⁰

The *Hutterian Brethren* majority decision has been characterized as going against the limits of state action as set out in *Amselem* and *Multani* and as giving a wide scope to the state under the section 1 proportionality test.¹⁰¹ For religious communities, this balancing and new understanding regarding the accommodation of difference is particularly significant for the way in which the majority upholds the constitutionality of state objectives in breaching this particular aspect of religious freedom.

Hutterian Brethren underlines the incommensurability of religious and secular premises. It is a complex matter for secular courts to judge religious beliefs and to make cross-cultural value judgments as to the impact of state regulations on cultural practices. Matters of accommodation are nuanced, complex, and yield no easy answers. As Berger argues, the sheer scope of the right to religious freedom makes it exceedingly complex and difficult to balance government objectives with the constitutional value of religious freedom.¹⁰² Indeed, McLachlin CJC notes this difficulty: "Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee."¹⁰³ McLachlin CJC also acknowledges that "[f]reedom of religion cases may often present this 'all or nothing' dilemma." She observes that "[c]ompromising religious beliefs is something adherents may understandably be unwilling to do. And governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people's religious beliefs and practices."¹⁰⁴ However, this observation has led her to a path of deference to the legislature and an acceptance of the legislation's objective as unassailable in effect rather than to a broad and generous interpretation of the right to religious freedom.

Hutterian Brethren's significance lies primarily in the manner in which it reconfigured the *Oakes* test, to hold that the photograph requirement imposed on

99. *Hutterian Brethren*, *supra* note 11 at para 109.

100. *Ibid.* *R v Oakes* [1986] 1 SCR 103.

101. See Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 *Supreme Court Law Review* (2d) 25 at 32.

102. *Ibid.* at 28.

103. *Hutterian Brethren*, *supra* note 11 at para 36.

104. *Ibid.* at para 61.

Hutterites was a reasonable limitation on their religious freedom and was only a minimal impairment on this right.¹⁰⁵ The chief justice rejected the notion of reasonable accommodation used by the *Multani* court, asserting that this principle had no place in an analysis of the limitation of a right under section 1's *Oakes* test.¹⁰⁶ McLachlin CJC modified the proportionality component of the *Oakes* test, in effect skipping the minimal impairment stage and leaving all of the balancing to be done at the last stage. The corollary of skipping the minimal impairment stage was that the government's objective was seen as unassailable. The Court did not question the evidence presented by the government regarding the security objective, which resulted in greater deference to the legislature and executive and finally left the balancing of salutary and deleterious effects of the impugned legislation to the third and fourth stages of the *Oakes* test.¹⁰⁷ This manner of interpreting the *Oakes* test resulted in a lack of examination of whether in fact there were less intrusive ways of achieving the same legislative goal. The majority paid little attention to the alternatives proposed in terms of the minimal impairment stage of the *Oakes* test. This reconfiguration of the *Oakes* test can only have a profound impact on future limitations of the right to religious freedom and the justification for such limitation.

In his dissent, Justice Louis LeBel objected to this approach to the *Oakes* test, asserting that it had resulted in treating the government's objective as unassailable and in a lack of consideration of alternatives.¹⁰⁸ He insisted that the *Oakes* test must foremost be decided in the context of constitutional values. He stated that the context of Canada's democratic values and the tradition of respect for rights animates the premise of the *Oakes* test and that the use of proportionate means in order to achieve legitimate purposes will justify the limitations of rights under section 1.¹⁰⁹ Interestingly, he noted that while it may be tempting to draw a sharp analytical distinction between the minimal impairment and balancing of effects parts of the *Oakes* test, it was not practical to do so.¹¹⁰ Further, he disagreed with the majority that the objective must be treated as unassailable.¹¹¹ He noted that alternative

105. *Ibid* at para 109.

106. *Ibid* at paras 66-71 ("[71] In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*"). It is important to note here however the different contexts of the *Multani* and *Hutterian Brethren* cases. Whereas *Multani* and the question of reasonable accommodation were raised in the context of an administrative decision by a school board, the latter centred on the demand for an exemption from a generally-applicable regulation. Nevertheless, the *Multani* court insisted that where *Charter* rights are infringed, a section 1 analysis is required. It did not make a conceptual distinction between reasonable accommodation and a section 1 analysis.

107. *Ibid* at paras 53-63.

108. *Ibid* at para 197.

109. *Ibid* at para 185.

110. *Ibid* at para 192.

111. *Ibid* at para 197.

measures could have been devised and was in agreement with Abella J that the majority's reasoning had trivialized the impact of the driver's license photograph requirement on the life of the colony members and that this requirement was not a proportionate limitation of the religious right.¹¹²

Abella J also disagreed with the majority, reminding the Court that the weighing of deleterious effects and balancing with the salutary effects must be done in the context of underlying *Charter* values and not in the context of the impugned legislation's goals.¹¹³ She held that the government had not discharged its evidentiary burden or proved that the salutary effects were anything more than speculative.¹¹⁴ She concluded that the government had not discharged its burden of proof demonstrating that the infringement was justified under section 1. She was critical of the lack of analysis by the majority regarding meaningful choice. In her own words, "[t]he mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community."¹¹⁵ Abella J pointed out that the majority failed to grapple with the impact of the photograph requirement on the way of life of the Hutterians and the lack of meaningful choice inherent in this proposition. Abella J did not agree with the characterization of the driver's license as a privilege rather than a right.¹¹⁶ She asserted: "To suggest as the majority does, that the deleterious effects are minor because the colony members could simply arrange for third party transportation, fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community."¹¹⁷ According to her, the impact was significant and the Hutterian's inability to drive would have both an individual and a collective impact because it would compromise their self-sufficient way of life.¹¹⁸ She was clear that "[t]he government must therefore show that the measure impairs the right as little as reasonably possible in order to achieve the legislative objective. To be characterized as minimal, the impairment must be carefully tailored so that rights are impaired no more than necessary."¹¹⁹

Arguably, the *Hutterian Brethren* decision has restricted the scope of the right to religious freedom. The reconfiguration of the *Oakes* test signals a new deference to the government, with the burden for justification and requirements of minimal impairment falling to the claimants themselves. For future religious freedom cases and claims to the accommodation of difference, the dissent might provide meaningful support for the constitutional protection of group difference and the internal

112. *Ibid* at paras 200-2.

113. *Ibid* at paras 153-4.

114. *Ibid* at paras 156, 162.

115. *Ibid* at para 170.

116. *Ibid* at paras 171-2.

117. *Ibid* at para 166.

118. *Ibid* at para 114.

119. *Ibid* at para 160.

coherence of section 2(a). However, in weighing the impact of a legislative regulation that infringes religious freedom, the *Hutterian Brethren* majority Court relied on the argument of choice to hold that the deleterious impact on section 2(a) of the regulation was minimal as it did “not negate the choice that lies at the heart of freedom of religion.”¹²⁰ Thus, there was a worrisome lack of engagement with, or real consideration of, meaningful choice in that particular context.

As Berger notes, while *Hutterian Brethren* does in fact confirm the position in *Amselem* that religion is private and protected as a matter of personal liberty and autonomy, the collective dimension of this right, while briefly noted by the majority, is not thoroughly examined. Berger asserts that “*Hutterian Brethren* confirms for us that, as far as Canadian constitutionalism is concerned, freedom of religion is ultimately a matter of autonomy and choice,” albeit in this case an erroneous understanding of choice.¹²¹ Further, for the assessment of the justice of minority claims, arguably the *Hutterian Brethren* decision signals the Court’s willingness to privilege collective social goals, as defined by the government, over minority group rights. In light of *Hutterian Brethren*, it would also seem that the Court would be open to a broad interpretation of pressing and substantial reasons for upholding legislation.¹²²

The 2012 Supreme Court of Canada decision in *SL v Commission Scolaire des Chênes* is the latest decision on religious freedom.¹²³ The case concerned the mandatory Ethics and Religious Culture (ERC) Programme in Québec schools, which replaced Catholic and Protestant programs of religious and moral instruction. Objecting to the ERC course, parents requested that their children be exempt from the course as it posed serious harm in violating their religious freedom. This decision is significant for its reaffirmation of, and emphasis on, the value of multiculturalism and for its understanding of the appropriate role of the state in recognizing and upholding social diversity.¹²⁴ The Court recognized that pluralist democracies have to balance competing interests in a manner that respects collective rights, religious freedom, and collective social goals. Interestingly, this case concerned the claims not of a minority religious group but, rather, of the opposite. The claimants asserted that their religious freedom was being infringed by a state policy that advocated religious relativism and forced their children to be exposed to ideas that were in conflict with their own Catholic faith.

The Court was mindful of the impact that the secularization of society might have on religious believers. Citing Richard Moon, the Court noted that the

120. *Ibid* at para 99.

121. Berger, *supra* note 101 at 37.

122. See, for example, Linda McKay-Panos and Brian Seaman, “Polygamy, Freedom of Religion, and Equality: What Happens When Rights Collide?” (January-February 2010) 34:3 *LawNow* 32 at 34.

123. *SL v Commission scolaire des chènes*, 2012 SCC 7 [*Commission scolaire*].

124. *Ibid* at para 40.

secularization of the state had resulted in the possibility that people of faith will feel that religion has been screened out of the public sphere, while a secular world view is privileged.¹²⁵ The Court also acknowledged the difficulties of strict religious neutrality. According to the Court,

[i]f secularism or agnosticism constitutes a position, worldview, or cultural identity equivalent to religious adherence, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical religious practices. But by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation of a nonreligious or secular perspective . . .

Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan antispiritual perspective.¹²⁶

The Court was also noticeably sensitive to multiculturalism, noting that “[t]he concept of state religious neutrality in Canadian case law has developed alongside a growing sensitivity to the multicultural makeup of Canada and the protection of minorities.”¹²⁷ The Court was emphatic that the religious diversity of Québec society was the reality against which their claim had to be contextualized. Applying these observations, the Court observed that

[p]arents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government’s obligations with regard to public education.¹²⁸

125. Richard Moon, “Government Support for Religious Practice” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 217.

126. *Commission scolaire*, *supra* note 123 at para 30.

127. *Ibid* at para 21.

128. *Ibid* at para 40.

Acknowledging the incommensurability of religious and secular premises, the Court also pointed out that it is a challenge for the Court to decide matters of religious faith.¹²⁹ In its firm support for the value of diversity and its protection through a policy of multiculturalism, this latest decision offers hope for future adjudication of minority claims for its insistence that majority norms cannot be unreflectively imposed on all groups in society; that multiculturalism is an integral aspect of Canadian public policy; that state neutrality with regard to public policy is an essential aspect of the commitment to group life; and, finally, that tolerance is a value that is essential in a diverse society and that this is a legitimate government (educational) goal.

This brings us to the place of equality in evaluating minority claims. Shannon Smithey argues that equality concerns have been central to the Court's interpretation of religious freedom and that the jurisprudence demonstrates the sensitivity of Canadian judges to questions of multiculturalism.¹³⁰ With regard to the place of equality in interpreting group rights, Carissima Mathen suggests that recent religious freedom jurisprudence reveals a concern with equality, interpreting claims to religious freedom more generously than claims to equality under section 15.¹³¹ At the same time, section 15 equality jurisprudence itself is undergoing changes, and there is a certain uneasiness with the direction that it has taken since *R v Law*.¹³² Scholars and commentators have lamented the return to a formal notion of equality and the end of the promise of *R v Andrews*.¹³³ Although it seemed as though the Supreme Court of Canada had acknowledged in *R v Kapp* the difficulties with the *Law* test to measure discrimination, it did not go far enough to dissociate itself from the concept of human dignity.¹³⁴ Further difficulties with *Kapp* relate to the role of section 15(2) as an independent equality provision, which seems to render government affirmative action programs free from section 1 scrutiny.¹³⁵ It would seem thus to confirm the trend of judicial deference to legislative purpose with little oversight. Nevertheless, in terms of the interpretive role of equality specifically in adjudicating group claims to religious difference, Mathen argues that, "[c]ourts in Canada display a sympathy to oppression of the religiously devout that often is absent in equality law."¹³⁶

129. *Ibid* at para 32.

130. Smithey, *supra* note 69 at 97.

131. Mathen, *supra* note 79 at 163.

132. See, for example, *ibid* at 164; Bruce Ryder, Cidalia C Faria, and Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 *Supreme Court Law Review* (2d) 103; Fiona Sampson, "LEAF and the Law Test for Discrimination: An Analysis of the Injury of Law and How to Repair It," Case Comment (Toronto: Women's Legal Education and Action Fund, 2004). *R v Law*, 2002 SCC 10, [2002] 1 SCR 227.

133. Mathen, *supra* note 79 at 164. *R v Andrews*, [1990] 3 SCR 870.

134. *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

135. See, for example, Mathen, *supra* note 79 at 176; Sophia Reibetanz Moreau, "R. v. Kapp: New Directions for Section 15" (2009) 40:2 *Ottawa Law Review* 283 at 295.

136. Mathen, *supra* note 79 at 164; *Amselem*, *supra* note 72; *Multani*, *supra* note 10.

On the whole, the Court has adopted a generous interpretation of the duty to accommodate and has breathed life into section 2(a).¹³⁷ Generally speaking, the Court has implicitly used section 15(1) of the *Charter* to interpret religious freedom to require governments to respect religious diversity.¹³⁸ Equality concerns have been important to judicial interpretation of the *Charter's* religious freedom provisions. Citing the need to protect minority religious communities, judges have often struck down government policy that favours a particular religious viewpoint. The Court has limited the ability of the state to support particular religious practices. It has promoted an understanding of religion that requires accommodating the diversity of Canadians.¹³⁹ Canadian religious freedom jurisprudence shows that the *Charter* does indeed have the potential to sustain progressive, rights-affirming decisions with profound implications for Canada's religious communities.¹⁴⁰

Legislation and Democratic Inclusion through the Lens of Québec's Bill 94

I argue in this section that the proposed legislative regulation of the *niqab* through Québec's Bill 94 illustrates the preoccupation with cultural difference as a major aspect of multiculturalism. The aim here is to use Bill 94 as a lens through which to look at the extent to which the politics of group rights focus on the status of women within minority groups rather than addressing their systemic disadvantage both inside and outside the group.¹⁴¹ Framing my inquiry in the context of arguments set out in the first part of this article, the legal and jurisprudential framework outlined in the second part provides the framework in which I situate Bill 94 as a legislative response to minority difference, which illustrates the limits of tolerance. Although it is beyond the scope of the article to go into the details of the reasonable accommodation debates in Québec, it is important to note that the issue of reasonable accommodation of minorities has been a matter of considerable controversy and debate in Québec, particularly after the Supreme Court of Canada's decision in *Multani*. In response to apparent public discontent, the Québec government launched the Bouchard-Taylor Commission to investigate the question of reasonable accommodation and minority rights.¹⁴² It is against this backdrop that we must situate this latest legislative initiative to regulate Muslim women as symbols

137. Mathen, *supra* note 79 at 181.

138. *Ibid* at 199.

139. Smithey, *supra* note 69 at 103-6.

140. *Ibid*.

141. See Gada Mahrouse, "'Reasonable Accommodation' in Québec: The Limits of Participation and Dialogue" (2010) 52:1 *Race and Class* 85.

142. See, for example, Gilles Bourque, "Bouchard-Taylor: Un Québec ethnique et inquiet," *Le Devoir* (30 July 2008).

of the threat posed to Québec identity and values of secularism and gender equality.¹⁴³

Bill 94 was introduced in the Québec Legislative Assembly on 24 March 2010 by then Justice Minister Kathleen Weil.¹⁴⁴ The precipitating event occurred in February 2009 when a young woman, enrolled in a French language instruction course, was asked to remove her *niqab* to allow the instructor to properly assist her in French language pronunciation. Her continued refusal, despite attempts to accommodate her, eventually led to her expulsion from the course.¹⁴⁵

Bill 94's purpose was "to establish guidelines governing accommodation requests within the Administration and certain institutions."¹⁴⁶ The bill effectively limits the right of women wearing the *niqab* to receive or deliver services from a range of public institutions when the wearing of the veil limits communication, hinders identification of the wearer, or presents security risks. This restriction would cover nearly every public institution including childcare centres, school boards, and public health facilities.¹⁴⁷ The purpose of the legislation was described as follows:

1. The purpose of this Act is to establish the conditions under which an accommodation may be made in favour of a personnel member of the Administration or an institution or in favour of a person to whom services are provided by the Administration or an institution. An adaptation of a norm or general practice, dictated by the right to equality, in order to grant different treatment to a person who would otherwise be adversely affected by the application of that norm or practice constitutes an accommodation.¹⁴⁸

143. See Mahrouse, *supra* note 141, for an excellent discussion of this question.

144. Bill 94, *An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions*, 1st Sess, 39th Leg, Quebec, 2010.

145. "Quebec Will Require Bare Face for Service," *CBC News* (24 March 2010) CBC News <<http://www.cbc.ca/news/canada/montreal/story/2010/03/24/quebec-reasonable-accommodation-law.html>>.

146. Bill 94, *supra* note 144.

147. *Ibid* at s 3 ("[t]he following are institutions within the meaning of this Act: (1) school boards, the Comité de gestion de la taxe scolaire de l'île de Montréal, institutions accredited for purposes of subsidies under the Act respecting private education (RSQ, chapter E-9.1), institutions whose instructional program is the subject of an international agreement within the meaning of the Act respecting the Ministère des Relations internationales (RSQ, chapter M-25.1.1), and general and vocational colleges and the university institutions mentioned in paragraphs 1 to 11 of section 1 of the Act respecting educational institutions at the university level (RSQ, chapter E-14.1); (2) health and social services agencies and public institutions and private institutions under agreement governed by the Act respecting health services and social services (RSQ, chapter S-4.2), intermediate resources, family-type resources and private nursing homes governed by that Act, legal persons and joint procurement groups referred to in section 383 of that Act, and the James Bay Cree health and social services council established under the Act respecting health services and social services for Cree Native persons (RSQ, chapter S-5); and (3) childcare centres, day care centres, home childcare coordinating offices and recognized home childcare providers subsidized under the Educational Childcare Act (R.S.Q., chapter S-4.1.1)").

148. *Ibid* at s 1.

The explanatory notes that are provided state that any request for accommodation will be considered in light of Québec's *Charter of Human Rights and Freedoms*, giving particular weight to principles of gender equality and state neutrality with respect to religion.¹⁴⁹ Indeed, as set out in the bill,

[t]o that end, the notion of accommodation is defined, all accommodations are made subject to the Charter of Human Rights and Freedoms, in particular as concerns the right to gender equality and the principle of religious neutrality of the State, and it is provided that an accommodation may only be made if it is reasonable, that is, if it does not create any undue hardship.¹⁵⁰

The bill also sets out the conditions under which accommodation may be made, emphasizing that considerations of cost are also relevant.¹⁵¹

Bill 94 illustrates the convergence of questions of religious freedom, women's equality, and minority rights.¹⁵² This bill is controversial because it requires Muslim women who wear the *niqab* to "show their face during the delivery of [government] services," denying them accommodation "if reasons of security, communication, or identification warrant it," calling for accommodation to the point of undue hardship.¹⁵³ This bill will impose a false choice on *niqab*-wearing Muslim women,

149. *Charter of Human Rights and Freedoms*, RSQ 2008, c C-12.

150. Bill 94, *supra* note 144 at 1 (Explanatory Notes).

151. *Ibid* ("CHAPTER II: CONDITIONS RELATED TO ACCOMMODATION 4. An accommodation must comply with the Charter of human rights and freedoms (RSQ, chapter C-12), in particular as concerns the right to gender equality and the principle of religious neutrality of the State whereby the State shows neither favour nor disfavour towards any particular religion or belief. 5. An accommodation may only be made if it is reasonable, that is, if it does not impose on the department, body or institution any undue hardship with regard to, among other considerations, related costs or the impact on the proper operation of the department, body or institution or on the rights of others").

152. The immediate background of this bill is of course particular to the Québec context where as a result of the *Multani* case, *supra* note 10, and the popular dissatisfaction with the Supreme Court of Canada's decision, the Québec government initiated the Bouchard-Taylor Commission. It is beyond the scope of the article, however, to go into the details of the commission and the Town Hall hearings that were conducted throughout the province of Québec. But it is important to note that the question of reasonable accommodation is one that is very much part of the province's political and social landscape. The recommendations of the Bouchard-Taylor Commission's report have yet to be implemented by the government. Yet, these reasonable accommodation deliberations have been understood as signaling direct participatory democracy.

Questions of reasonable accommodation and freedom of religious practices are not new to Québec society. Reasonable accommodation refers to the obligation that private and public institutions have to accommodate diversity in their staff and clientele so long as the accommodation does not cause excessive disruption in the organization. In Québec, reasonable accommodation was intended to provide a viable option for addressing increasing diversity in the population.

153. Bill 94, *supra* note 144 at s 6 (its central provision, section 6, reads as follows: "The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution show their face during the

forcing them to select between their rights as Canadian women and their rights to remain within their faith and community. The government defended the proposed law by invoking the principles of gender equality, religious neutrality, and secularism.¹⁵⁴ The values of secularism, neutrality, and equality that were noted in Supreme Court of Canada religious freedom cases make their appearance here as justifications for the denial of religious freedom and the denial of autonomous choice, agency, and liberty.

Martha Nussbaum argues that legislative restrictions on veiling justified on grounds of gender equality, liberty, and state neutrality are unacceptable in a society committed to equal liberty and respect.¹⁵⁵ This legislation would have the effect of excluding *niqabi* Muslim women from public life. Rather than achieving the state's avowed goals of greater integration and inclusion, this new law would arguably serve to exclude Muslim women as citizens, as a result of action not by community leaders but, rather, by a liberal democratic state. This exclusion of Muslim women and an encroachment on their rights surprisingly comes from a dogmatic implementation of secularism and an unyielding notion of multiculturalism, both of which must be considered in the context of a post-9/11 Islamophobia.¹⁵⁶

While Bill 94 has been welcomed by some groups, it has been opposed by several others, including the Women's Legal Action and Education Fund, the Canadian Civil Liberties Association (CCLA), the Canadian Council of Muslim Women (CCMW), the Simone de Beauvoir Institute of Concordia University in Montreal, and the Archdiocese of Montreal, to name but a few.¹⁵⁷ A key organization that welcomed the bill was the Québec Council on the Status of Women, a government advisory body. According to Christine Pelchat, the president of the group, Bill 94 is an important step in asserting core Québec values of secularism and gender equality.¹⁵⁸

delivery of services is a general practice. If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied").

154. "Quebec Will Require Bare Face for Service," *supra* note 145.

155. Martha Nussbaum, "Veiled Threats?" *New York Times* (11 July 2010) *New York Times*: The Opinion Pages <http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/?_r=0>.

156. See, for example, Hilal Elver, "Secular Constitutionalism and Muslim Women's Rights: Global Debate on Headscarf" in Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana, eds, *Feminist Constitutionalism* (Cambridge: Cambridge University Press, 2012) 413 (significantly, even the Bouchard-Taylor Commission's report notes the context of anti-Muslim sentiment post 9/11).

157. Women's Legal Education and Action Fund, "Women's Legal Education and Action Fund (LEAF) Submission to the Quebec National Assembly on Bill 94" (7 May 2010) LEAF <[http://www.leaf.ca/features/documents/C3/LEAF20Submission20to20Quebec20National20Assembly20on20Bill209420\(Final20-20English\).pdf](http://www.leaf.ca/features/documents/C3/LEAF20Submission20to20Quebec20National20Assembly20on20Bill209420(Final20-20English).pdf)>; Canadian Civil Liberties Association (CCLA), "CCLA Opposes National Assembly Bill 94 (The Niqab Bill)," News Release (31 March 2010) CCLA <<http://www.ccla.org/2010/03/31/the-niqab-bill/>>; Simone de Beauvoir Institute, "Simone de Beauvoir Institute's Statement in Response to Bill 94," Statement (7 April 2010) Simone de Beauvoir Institute <<http://wsdb.concordia.ca/documents/SdBI2010Bill94-bilingualresponse.pdf>>.

158. "Quebec Will Require Bare Face for Service," *supra* note 145 (according to Christine Pelchat, quoted in the cited CBC News article, "[t]he bill is an important step towards preserving the

In contrast, the CCMW, in its brief to the National Assembly of Québec, expressed concern that such legislation would have the effect of restricting the participation of Muslim women in social and political institutions. Far from promoting equality, Bill 94 would result in moving Muslim women further away from mainstream participation and would lead to strengthening the boundaries between “them” and “us,” leaving Muslim women on the margins of equal citizenship.¹⁵⁹

The CCLA also opposed Bill 94, particularly its central provision, section 6, which provides as follows:

The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution shows their face during the delivery of services is a general practice. If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.¹⁶⁰

Not surprisingly, the CCLA condemned the impact such a law would have, excluding women from the workplace and from educational institutions. In addition, the CCLA noted that due to the vagueness and generality of the terms, it is difficult to ascertain the range of application of the law. The CCLA criticized the bill for being too vague a general prohibition, which would lead to further abuse and marginalization of Muslim women, rather than forward their integration and acceptance into mainstream society. Moreover, it explicitly condemned Bill 94 as being potentially violative of freedom of expression as well as freedom of religion.¹⁶¹

Legal scholars too have questioned the constitutionality of the proposed bill. Beverley Baines argues that Bill 94 would not withstand a *Charter* challenge. *Charter* rights to sex equality, freedom of religion, as well as the rights to liberty and security of the person under section 7 are implicated by Bill 94. Certainly, *Charter* rights are not absolute, and so the *niqab* ban must be suitably restricted “in order to fulfill an objective that this limitation on rights under Bill 94 can be demonstrably justified in a free and democratic society.”¹⁶² However, Baines contends that the objective of sex equality could equally be met by reasonably accommodating *niqab*-wearing women rather than by offering them a blanket denial of

equality of women. When you live in a society there’s a minimum of common rules that has to be respected”).

159. Canadian Council of Muslim Women, “Brief to the National Assembly of Quebec, Committee on Institutions to Provide General Consultation on Bill 94: *An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions*,” Policy Brief (7 May 2010).

160. “Quebec Will Require Bare Face for Service,” *supra* note 145 at s 6.

161. CCLA, *supra* note 157.

162. Beverley Baines, “Bill 94: Quebec’s Niqab Ban and Sex Equality,” *Women’s Court of Canada* (12 May 2010) Women’s Court of Canada <<http://womenscourt.ca/2010/05/bill-94-quebec’s-niqab-ban-and-sex-equality/>>.

reasonable accommodation on the basis of their wearing a *niqab*. Baines argues that the government's asserted security needs could be met by reasonable accommodation on a case-by-case basis rather than by an over-inclusive restriction. According to her, the provisions of Bill 94 give authorities the "absolute discretion to invoke reasons of security, identification and communication to deny reasonable accommodation to women who wear the *niqab* in Quebec."¹⁶³

Although it is uncertain how the Supreme Court of Canada would decide a constitutional challenge to Bill 94, based on Court jurisprudence up until the *Multani* case, Baines suggests that it would seem likely that the Court would rule in accordance with the principle of substantive equality, paying attention to minority rights, reasonable accommodation, and multiculturalism.¹⁶⁴ However, the Court's decision in *Hutterian Brethren* suggests that a reasonable accommodation approach to religious difference has been eschewed by the highest court.¹⁶⁵ Accepting the government's justification for a limitation on religious freedom, the Court in its majority gave greater latitude to the government objective of security.¹⁶⁶ As such, *Hutterian Brethren* seems to close the door, which was remarkably opened in *Multani*, to the accommodation of religious difference that helps to preserve group life. On the other hand, the dissents in *Hutterian Brethren* are cause for optimism that religious freedom jurisprudence has much to offer to understandings of multiculturalism and the recognition of difference.

Bill 94 raises questions that go to the heart of issues of democracy, equality, religious freedom, and minority rights. What are the rights implications of this bill? Does it forward women's equality and promote inclusion? Does it promote women's agency and choice? Can it be seen as emancipatory for all women? What about the particular impact on minority women? Does it encourage democratic participation?¹⁶⁷ Cass Sunstein notes that the obvious question raised in any discussion

163. *Ibid.*

164. *Ibid.*

165. *Hutterian Brethren*, *supra* note 11 at para 68 ("[r]easonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties—most commonly an employer and employee—adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party"). See also para 66 ("[w]here the validity of a law is at stake, the appropriate approach is a section 1 *Oakes* analysis. Under this analysis, the issue at the stage of minimum impairment is whether the goal of the measure could be accomplished in a less infringing manner").

166. Mathen, *supra* note 79 at 196.

167. A related example, beyond the scope of this article but necessary to note, is the "*Niqab* case" in Ontario, *R v NS*, 2010 ONCA 670, aff'd 2012 SCC 72, [2012] 3 SCR 726, a case that considered whether a sexual assault complainant may testify at a preliminary inquiry while wearing a *hijab* and *niqab* that cover her face and body, except for her eyes. Along with other civil rights groups, LEAF was an intervener in this case. LEAF argued that the exclusion of *niqab*-wearing complainants from accessing justice further marginalizes and stigmatizes an already disadvantaged group of women and increases their vulnerability to sexual violence and other crimes. The need to create an accessible and respectful space for *niqab*-wearing women in the courtroom is significant in terms of advancing the equality rights of racialized, minority women and

of these issues is “[w]hat is the appropriate domain of secular law insofar as governments seek to control discriminatory behaviour by or within religious institutions?”¹⁶⁸ The proposed *niqab* ban raises several issues, particularly those of gender justice, minority rights, notions of equality, the accommodation of difference, and anxieties about the illiberal practices of minorities. Perhaps too simplistically, the issue was presented as one that set gender equality in opposition to religious freedom, casting the state in a role that rescues Muslim women from barbaric customs and outdated laws. Muslim women, simultaneously, were cast as victims, lacking agency and free choice, and in need of rescue by a benevolent, enlightened state.¹⁶⁹

Whatever one’s personal views are on the *niqab*, effectively disenfranchising *niqabi* women contradicts the principle of substantive equality and fails to respect and protect their *Charter* rights. Denying *niqab*-wearing women access to the public sphere cannot be justified on the basis that it furthers their equality. Nor can this denial be justified on the basis that such exclusion is liberating or that it will serve to save them from outdated customs and norms, thereby ending their segregation.

The reasons given in Bill 94 for refusing accommodation are those of security, communication, and identification.¹⁷⁰ According to Azim Hussain, the criteria set out in Bill 94 simply echo those already established by the Supreme Court of Canada. Citing *Multani* and *Hutterian* as laying down the conditions of security and identification, Hussain suggests that religious freedom jurisprudence already mandates that for reasons of security, communication, and identification, exemptions cannot be claimed under the right to religious freedom.¹⁷¹ In *Multani*, Hussain notes that “the Supreme Court of Canada canvassed the argument that the concern

ensuring their equal participation in Canadian society, rather than the perpetuation of their marginalization and exclusion. The Court of Appeal quashed a decision by a preliminary inquiry judge that required the complainant, N.S., to remove her *niqab*, finding that the judge had not conducted a full inquiry into N.S.’s religious freedom claim. The appeal judges sent the issue back to the judge who was presiding over a preliminary inquiry in the case in order that he consider the matter in greater detail. The Court of Appeal’s decision affirms religious freedoms and provides other courts with a roadmap for assessing religious freedom claims when they are alleged to conflict with the fair trial rights of an accused person. Although the Court ruled that Muslim witnesses wearing a face-covering *niqab* must remove it to testify if the covering would truly jeopardize a fair trial, the Court made clear that the circumstances when this will be the case are likely to be rare. Overall, the Court’s decision respects religious freedoms. The Court noted that allowing a sexual assault complainant to wear a *niqab* while testifying may promote gender equality and also recognized the importance of her religious beliefs, reflecting Canada’s multicultural heritage. The Court of Appeal’s decision is an important step forward towards a more inclusive justice system.

168. Cass Sunstein, “Should Sex Equality Law Apply to Religious Institutions?” in Cohen, Howard, and Nussbaum, *supra* note 47, 85 at 85.

169. Razack, *supra* note 2 at 7, 10, 15.

170. “Quebec Will Require Bare Face for Service,” *supra* note 145 at s 6.

171. Azim Hussain, “Face-Covering, Fraternity and the Veil Debate” (Paper delivered at A Symposium in Honour of Charles D Gonthier: Responsibility, Fraternity and Sustainability in Law, Faculty of Law, McGill University, 20-1 May 2011) at 35-8 [unpublished].

for safety can serve to limit a religious right.”¹⁷² Arguably, rather than creating a new law, the bill merely codifies the existing legal position that government officials, institutions, and policies have a duty to accommodate up to the point of undue hardship.

However, this argument does not adequately interrogate or problematize these decisions. In particular, it does not adequately take into account that the *Hutterian Brethren* majority opinion has restricted religious freedom and reconfigured section 1 such that legislation is cast as virtually unassailable if the stated purpose is that of security and identification. Moreover, the political context of anti-Muslim sentiment, acknowledged even by the Bouchard-Taylor Commission, is not adequately considered by Hussain. Interestingly, the Parti Québécois’s primary objection to Bill 94 is that it does not go far enough as it does not categorically ban the *niqab* but simply restates the jurisprudential position that there is a duty to accommodate up to the point of undue hardship.¹⁷³

It might be that the message of the bill is more pernicious than its actual legal impact. The question arises then as to the message the government is sending out by this bill. In the context of reasonable accommodation debates and the *Multani* decision, this bill can be understood as being intended to have a political impact rather than any legal impact. Indeed, there has been an overwhelmingly positive endorsement of Bill 94 in Québec.¹⁷⁴ Despite the fact that actual numbers of Québec women who wear the *niqab* are extremely low, the fraught history of religion and secularism in Québec has formed the context in which this question of the *niqab* has resonated so deeply within Québec society, fuelled as well by anxieties of identity, secularism, and immigrants’ illiberal practices.¹⁷⁵

The proposed *niqab* restriction demonstrates the importance of reassessing simplistic policies of multiculturalism. It underscores the need to interrogate the place of culture in public policy and its implications for organizing resistance against governmentality.¹⁷⁶ The legislative restriction on the *niqab* signifies the encroachment by the liberal democratic state on the rights of a racialized gendered minority. We now have a situation where in the name of liberal secular democracy, Muslim women’s rights are being curtailed.¹⁷⁷ Indeed, as Aziza Al Hibri observes, “whether or not we agree with the wearing of the *niqab*, to ban it legislatively is to violate

172. *Ibid* at 35.

173. “Quebec Will Require Bare Face for Service,” *supra* note 145 (the CBC News story contains a statement by the Parti Québécois’s spokesperson, Veronique Hivon).

174. See, for example, Carissima Mathen, “Anti-Niqab Laws: Quebec Wrestles with Religious Accommodation,” *Lawyers Weekly* (16 April 2010) <http://www.lawyersweekly.ca/index.php?section=article&articleid=1144>.

175. Mahrouse, *supra* note 141 at 86-7, 91-2.

176. Razack, *supra* note 2 at 19.

177. This is similar to the situation in India where following the *Shah Bano* case the *Muslim Women’s (Protection of Rights on Divorce) Act* was enacted and justified as protecting Muslim women’s rights in a secular democracy. In actual fact, it excluded Muslim women from rights enjoyed by other Indian women and discriminated explicitly on the basis of both gender and religion.

basic civil rights and leads to oppression.”¹⁷⁸ This statement brings us to the definition of culture and the need to see it in a less static light.¹⁷⁹

This proposed legislation illustrates that in order to have an inclusive democratic dialogue, it is necessary to challenge the stereotypical view of the “Other.”¹⁸⁰ The conversation has to start from the point of a more accurate understanding of diverse cultures and the diversity of opinion among and between cultural groups rather than from their conflation. Specifically, in considering any legislative regulation of women’s bodies and clothing, such as the proposed Bill 94, it is necessary to include the voices of women and to recognize the ways in which Muslim women legitimately claim both gender equality and the affirmation of faith-based values.

Bill 94 and its justification illustrate the persistence of discourses of Orientalism and colonialism in contemporary attitudes to Muslim women. These discourses contribute to reinforcing the Otherness of Muslim women. There is an accompanying homogenizing of minority communities and with it the idea that the Muslim community is monolithic. The understanding emerges unquestioned in such a legislative initiative that women’s bodies and what they might be permitted to wear or not wear is a legitimate matter for the liberal, democratic state to intervene in. This understanding demonstrates the continuities with the colonial past—the civilizing mission of colonialism and its subjectifying gaze. A critical impact of this justification of intervention to “save” Muslim women is the resurrection of narratives of saving and rescue. There is a persistence of the Orientalist framework in Western mainstream feminists’ efforts to rescue Muslim women from their outdated, backward, and barbaric laws.¹⁸¹ This discursive construction of Muslim women as victims without agency underscores the difficulty posed for them in pursuing a progressive politics for fear of feeding into the anti-Muslim agenda.¹⁸²

Related to this understanding is the lack of complexity in understanding the veil. The veil is not problematized but, rather, is the focus of a neo-colonial attitude that sees the veil as the single defining characteristic of Muslim women. The veil is a complex, nuanced issue that is seen in mainstream Western society as fixed, unchanging, and ahistorical. We need to complicate the simplistic understanding of the veil forwarded by the state to justify Bill 94. The veil is understood as signifying victimhood, passivity, and lack of agency, while those seeking to ban it are portrayed as progressive and liberal, intent on rescuing women from their oppressive customs.¹⁸³ Yet, the veil should be seen in numerous complex ways as an

178. Al Hibri, *supra* note 68 at 44.

179. *Ibid* at 51.

180. See, for example, Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal and Kingston: McGill University Press, 2010) at 138-9.

181. Razack, *supra* note 2 at 16.

182. *Ibid* at 6.

183. See, for example, Homa Hoodfar, “The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women” (1993) 22:3-4 *Resources for Feminist Research* 5 at 5.

overdetermined powerful marker of difference, an essentialized symbol of a “traditional” identity.¹⁸⁴

While it is not within the scope of this article to go into the reasons why women wear the veil, it is important to note that the reasons are manifold and complex.¹⁸⁵ In diasporic Muslim communities, although it might be associated with tradition, it also expresses a new identity, a de-territorialized Muslim political identity. It would be mistaken to simplistically understand the veil as necessarily fundamentalist and Islamist. As Pnina Werbner explains, “[t]hat identity is not necessarily however, fundamentalist, Islamist or radical, since its meaning and the politics of embodiment it represents may differ widely in different contexts and from individual to individual.”¹⁸⁶ Veiling is symbolic in wider religious and national contexts in the context of migration and diaspora, and the symbolization of the veil impacts Muslim women in ambivalent ways.¹⁸⁷ This symbolism of the veil raises questions as to who has the authority to interpret the scriptures and the role of women in defining group culture. These debates are global, with reformists, secularists, Islamists and feminists many of whom claim authority over, and legitimacy from, the Koran.¹⁸⁸

The importance of context also influences the choices made and impacts the veil’s multiple and varied meanings. Arguably, Bill 94 does not fulfil the avowed purpose of liberating women in the secular state. On the contrary, it serves to reinscribe Muslim women as “Other,” excluding them from participating in public life and moving them further away from inclusion in democratic participation.¹⁸⁹ A legislative restriction is arguably too heavy handed a response to the assertion of Muslim identity. As Pnina Werbner notes,

the law is a very blunt tool and its consequences are likely to be counter-productive. It may produce a school boycott and exclusions from school. It leads to a cultural clash and is likely to generate a Muslim backlash and a general sense of alienation and rejection even amongst those Muslims who do not veil.¹⁹⁰

Indeed, Bill 94 could well be seen as targeted at Muslims in particular under the pretexts of secularism and gender equality.¹⁹¹ Secularism is elevated, uninterrogated, raised to an exalted status, and is used to justify laws in the name of the emancipation of Muslim women, which some mainstream feminists support as a

184. Pnina Werbner, “Veiled Interventions in Pure Space: Honour, Shame and Embodied Struggles among Muslims in Britain and France” (2007) 24:2 *Theory Culture Society* 161 at 172.

185. Hoodfar, *supra* note 183 at 15.

186. Werbner, *supra* note 184 at 172.

187. *Ibid* at 172-4.

188. *Ibid* at 162.

189. Razack, *supra* note 2 at 6.

190. Werbner, *supra* note 184 at 177.

191. *Ibid* at 178.

universal model of women's freedom.¹⁹² Secularism as a discursive trope is used to signify a narrative of progress and modernity, yet Sherene Razack draws our attention to the close links between the triumph of secularism and colonialism.¹⁹³ Ironically, feminist faith in secularism might well result in the greater regulation of Muslim women. It becomes critical then to deconstruct the notion of secularism and to understand how the secular/religious binary is superimposed on the modern/pre-modern understanding of mainstream society and racialized communities and results in the disempowerment of Muslim women.

If the intention of Bill 94 is to promote greater equality and increased integration, then rather than using the blunt instrument of the law and excluding *niqabi* women, a more fruitful method would be a strong educational and training campaign while creating and sustaining a safety network for Muslim women.¹⁹⁴ Werbner notes that multiculturalists emphasize educating citizens to tolerate overt signs of difference as a way of sustaining a pluralist society. However, it is necessary to contest the use of secularism as a notion that all groups can adhere to because experience has demonstrated the failure of assimilation to safeguard against discrimination. In Werbner's words, "[i]n this context therefore, arguably, minority rights to public signs of difference must be seen as a basic right, particularly when as in the context of the niqab, the practice causes no harm to others."¹⁹⁵

At the same time, the complexity of the veil as a symbol of honour/shame and its impact on Muslim women has to be acknowledged. Nevertheless, the response to veiling must not be legislative regulation but, rather, inclusion and engagement in a deliberative democratic dialogue.¹⁹⁶ Not surprisingly, the Supreme Court of Canada has recognized the critical role of educational institutions in imparting values of basic human dignity and equality.¹⁹⁷ Yet Bill 94 is a continuing reminder that despite discussions of reasonable accommodation, the representation of Muslims in the public sphere is that of "problems" and a fear of the illiberal practices they are perceived to bring. While structural politics understands systemic inequalities of race, gender, and class, cultural difference politics obscures the extent to which cultural freedom and issues of structural inequality are racist. Public debate on issues such as whether headscarves should be allowed seems to displace structural problems onto issues of culture. These debates tend to ignore issues of poverty, unemployment, poor education, and segregation while, at the same time, magnifying issues related to religion or culture.¹⁹⁸

192. *Ibid.*

193. Razack, *supra* note 2 at 19-22.

194. Werbner, *supra* note 184 at 164.

195. *Ibid* at 178.

196. *Ibid* at 179.

197. Multani, *supra* note 10; *Commission scolaire*, *supra* note 123.

198. Young, *supra* note 1 at 63.

The latest legislative development in Québec is Bill 60, *The Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Women and Men, and Providing a Framework for Accommodation Requests*.¹⁹⁹ It was introduced by Bernard Drainville, the minister responsible for democratic institutions and active citizenship on 7 November 2013. On its face, the bill seeks to enhance gender equality in the province by banning “ostentatious” religious symbols from the public sphere, including the *hijab*, *niqab*, *kippah*, Sikh turban, and oversized crosses as a means to promote a secular public sphere. While the bill covers a host of religious symbols, it is clear that it targets veiled and *niqabi* Muslim women. Like Bill 94, Bill 60 effectively limits the right of women wearing a *niqab* to deliver or receive services from a range of public institutions “if warranted for security or identification reasons or because of the level of communication required.”²⁰⁰ Bill 60 represents the persistence of a politics of exclusion in Québec, based on prejudicial, stereotypical understandings of the “Other.” Under the Parti Québécois government, Muslim women continue to be the focus of legislative initiatives that frame them as problems and as threats to the secular, democratic consensus of liberal democracy.

The multiculturalism debates are focused on the status of women built around “certain dreadful practices.” The stereotyping of racialized minority women has created and perpetuated myths about their participation in social and political institutions. Simultaneously, their resistance to patriarchy both within their communities and within broader society and their contestation of gender hierarchies is excluded. Certainly, the question of the *niqab* raises all sorts of questions about agency. However, the language of multiculturalism, the ascribing of oppression to racialized communities and to their cultures, forecloses the possibility of any meaningful analysis, not just of these communities themselves but also of mainstream society. The reluctance to turn the gaze back upon itself perpetuates myths about mainstream society and constructs it as free in opposition to victimized Muslim women. Interrogating culture allows for disentangling it from an analysis of racism and economic exclusion and allows for a policy of multiculturalism that can focus on bread and butter issues and one that can recognize that members of racialized minority communities have the same claims and aspirations for their children as do those in mainstream society. From such an interrogation, it follows that it is necessary to problematize culture and to question who the representatives of this culture are and who is accepted by the state as community leaders.

This questioning of culture is related to the importance of placing women at the centre of analysis and seeks to recover women’s agency. Such questioning allows the possibility of viewing the wearing of the veil or *niqab* as a mode of female

199. Bill 60, *The Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Women and Men, and Providing a Framework for Accommodation Requests*, 1st Sess, 40th Leg, Québec, 2013.

200. *Ibid* at ss 6 and 7.

resistance and agency. It may be seen as an assertion of women's identity and autonomy and their resistance and challenge within the wider political context. Padma Anagol argues that it is necessary to move beyond the rather limited configurations of agency based on issues of "consent" or "coercion . . . transgression or subversion that reduce autonomy to mere resistance."²⁰¹

Interrogating culture reveals that culture itself is contested, that groups are not homogeneous, that a diversity of opinion exists within groups, and that the category "Muslim" is not monolithic. The central focus on the politics of cultural difference results in cultural reductionism, it reduces anti-racism simplistically to a cultural critique. The effect is to minimize the significance of the impact of structural and institutional processes that keep racialized minorities excluded from political participation. The call to disentangle culture from the state distribution of patronage and benefits is a call to reinsert gender into the conversation and to situate inequality within a historical materialist reading of power.²⁰² Social and economic rights must be recognized, and it is necessary as well to address the problems of racism and economic discrimination.²⁰³ Significantly, An Na'im asserts that,

[i]n particular I emphasize that all women's rights advocates must continue to scrutinize and criticize gender discrimination anywhere in the world, and not only in Western societies. But this objective must be pursued in ways that foster the protection of all human rights, and with sensitivity and respect for the identity and dignity of all human beings everywhere . . . In other words, I say that all cultures must be held to the same standards not only of gender equality but also of all other human rights—racism and economic inequality are major problems.²⁰⁴

Turning the gaze back onto the community itself, it is essential to work within minority cultures themselves rather than to abandon multiculturalism because of its inherent risks for vulnerable minorities within the group itself.²⁰⁵ Community leaders themselves move quickly on from dismissing the extent and nature of oppressive practices to denouncing mainstream society's critique of these practices. There is not much attention paid to the gendered disadvantage within the communities, the truth of these practices, and their impact on women. Rather, we are invited to critique the critics.²⁰⁶ Women within racialized minority communities have

201. Padma Anagol, *The Emergence of Feminism in India, 1850–1920* (Hampshire, UK: Ashgate Publishing, 2005) at 10.

202. See, for example, Himani Bannerji, "Pygmalion Nation: Towards a Critique of Subaltern Studies and the 'Resolution' of the Women's Question" in Himani Bannerji, Shahrzad Mojab, and Judith Whitehead, eds, *Of Property and Propriety: The Role of Gender and Class in Imperialism and Nationalism* (Toronto: University of Toronto Press, 2001) 34 at 59.

203. An Na'im, *supra* note 48 at 61-2.

204. *Ibid.*

205. *Ibid* at 64.

206. Bannerji, *supra* note 202 at 47-52, 55.

difficulty articulating or pursuing an agenda for social change for fear that this will feed into a racist agenda. They are discouraged from critically examining what within the traditions of the community needs to be changed, because to do so would validate the worst fears and anxieties about illiberal immigrant practices.²⁰⁷

The danger is also that Muslim women's own challenge to gender disadvantage and patriarchy within the community is de-radicalized by a move whereby Western mainstream feminists are engaged in a narrative of saving women from their own cultures.²⁰⁸ The role of mainstream feminists and the possibility of universal sisterhood are raised by the *niqab* issue. Positioned as the "Other," Muslim women quickly become marginalized in any appeals to universal sisterhood. Simultaneously, to be included in the universal feminist project often means shedding this "Other(izing)" culture.²⁰⁹ In their support of the *niqab* ban, Québec feminists come dangerously close to the position of those opposed to minority rights and seeking the erasure of difference. By adopting a stance that does not serve to empower Muslim women or to recognize their agency in the (mis)conception that they are forwarding the cause of feminism, they reinforce the hegemonic state and resurrect the victim narrative that sees Muslim women solely in terms of suffering at the hands of patriarchy, thus necessitating Western feminists' intervention.

Finally, this neo-colonial discourse has a distinct notion of "homonationalism," a masculinist nature, as the oppressed Muslim woman suddenly becomes *the* Muslim community. The exclusion of women from the democratic "public sphere" by further "otherizing" them serves no empowering or liberating purpose. The undue focus on culture separates it from the political economy of marginalization and exclusion, it serves to erase history, social, and economic relations, and it excludes others, minorities, and disempowered groups. Such an understanding cannot be inclusive or relevant for women as citizens. It avoids real issues of social justice and subsumes difference within a rhetoric of culture, which can only have a profound impact on the contemporary understanding of women's rights and roles and their relationship to the state.²¹⁰ It raises the spectre of a new colonization for Muslim women.

207. Razack, *supra* note 2 at 6-7.

208. *Ibid* at 6, 29.

209. Volpp, *supra* note 1 at 1201.

210. Razack, *supra* note 2 at 16-18.