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

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"You know it's hard to draw lines for the ordinary citizen when even the judges are confused"

Mario Dumont, Former leader, Democratique du Quebec[2]

1) Introduction

The paper introduces a Canadian case debating religious exemption in a high-stakes environment. *R v NS*[3] occurs in the context of a criminal trial, where granting a witness a religious exemption may directly affect the accused's rights. NS is a niqabi[4] woman called to testify against her alleged sexual assaulters in court. The accused asked that NS would unveil while testifying so as to allow a full cross-examination and credibility assessment of her. The Supreme Court agreed that there exists a common-law rule requiring witnesses to testify in a manner that allows access to their demeanour. The discussion then turns to two questions: a) Does the niqab limit access to demeanour? and b) If so, how should the conflict of rights – trial fairness and religious freedom – be resolved? In terms of religious exemptions, the question could put like so: Given a legitimate rule of general application, should a religious exemption nevertheless be granted where a religious practice is incompatible with the rule?

The Canadian Supreme Court is divided. The majority wants to avoid the question at all cost. It defines narrowly the circumstances in which the question even arises, prefers a compromise in a case of conflict of rights, and opts for limiting religious freedom because it finds that this right will suffer less from a limitation in this case. The concurring opinion wants to never allow the exemption. It redefines the general rule: instead of protecting the accused, the rule is defined as protecting the integrity of the justice system at large. The dissenting opinion wants to allow the exemption in all cases. It compares the niqab to other personal characteristics that are regularly exempt from the common-law rule and extends the niqab the same treatment.

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[2] Les Perreaux and Verity Stevenson, "Quebec's Growing Divide" *Globe and Mail* (March 20 2015), online: Globe and Mail <http://www.theglobeandmail.com/news/national/what-drove-seven-young-quebeckers-into-the-arms-of-the-islamic-state/article23569474/>.

[3] 2012 SCC 72, (*sub nom R v SN*) 353 DLR (4th) 577 [*R v NS*].

[4] The niqab is an Islamic veil covering the face but not the eyes.

The paper has two goals. First, it aims to provide those interested in questions of religious exemptions with an interesting example of a religious-exemption debate in court. The example is meant to show how Justices themselves struggle with requests for religious exemptions, the variety of argumentative tools they employ, and of the deep disagreement amongst themselves regarding the right solutions.

Second, the paper critically assesses the decision and the different arguments offered by Justices, and offers what I hope is a more useful principle for assessing requests for religious exemptions: the Meaningful Choice Principle. The idea that religious freedom is supposed to provide individuals with meaningful choice to practice their religion is employed in another Canadian case, *Hutterian Brethren*.[5] Here I develop the idea into a decision-making rule.

2) *R v NS* 2012 SCC 72: The Decision

The inquiry of *R v NS* starts with the facts of the case. NS's uncle and cousin stand charged of sexually assaulting her when she was a child. NS was called to testify for the prosecution. NS wears a niqab and testified that she does so out of religious conviction. At the preliminary inquiry, one of the accused asked that NS be ordered to remove the niqab while testifying. The accused claimed that his right to a fair trial, including the right to cross-examination and the right to face his accuser, was a stake. The judge ordered NS to remove her niqab, based on a finding that her religious belief was "not that strong" because she removed the niqab when she was photographed for her driver's licence and she testified that she would remove it if required to do so at a border crossing.[6] The decision of the preliminary inquiry judge sparked a legal debate that went all the way to the Supreme Court.

NS applied to the Ontario Superior Court of Justice, which held that she should be allowed to testify wearing her niqab if she asserted a sincere religious reason for doing so, but that the judge could exclude her evidence if the niqab prevented true cross-examination.[7] Both NS and the accused appealed the judgment to the Ontario Court of Appeal which held that sincerity is the correct test for a request for religious reasons and that the religious freedom of NS should be reconciled with the accused's right to a fair trial. If reconciliation was not possible by way of adapting court procedures to accommodate the niqab, the right to a fair trial may require that NS be ordered to remove her niqab. The Court named several considerations to be included in the process of balancing the parties' rights, including, for example, whether the credibility of the witness is at issue and the impact of the niqab on the demeanour assessment.[8] NS appealed to the Supreme Court of Canada.

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[5] *Alberta v Huttrian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 [*Huttrian Brethren*].
[6] *R v NS* at para 4.
[7] *R v NS*, (2009) 95 OR (3d) 735, 191 CRR (2d) 228, restated in *R v NS* at para 5.
[8] *R v NS*, 2010 ONCA 670, 102 OR (3d) 161, restated in *R v NS* at para 6.

Reasons for Judgment *per* McLachlin CJ

McLachlin CJ, writing the majority's decision, treated the case in question as a matter of conflicting rights that requires a balancing exercise as a solution. When defining the issue at hand, McLachlin stated: "Two sets of *Charter* rights are potentially engaged – the witness's freedom of religion (protected under s. 2(*a*)) and the accused's fair trial rights, including the right 10 to make full answer and defence (protected under ss. 7 and 11(*d*))."[9] McLachlin CJ then set the task to resolve the conflict of rights in this case.

McLachlin CJ found that the solution to a conflict of rights has to be a compromise between the rights. She rejected what she called two "extremes"[10]: a "secular"[11] approach that requires witnesses to "park their religion at the courtroom door"[12] and sets a rule according to which the niqab will never be allowed in court, and an approach according to which a witness will always be allowed to testify wearing the niqab. McLachlin CJ rejected the secular approach because it is "inconsistent with the jurisprudence and Canadian tradition,"[13] a "tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible."[14] McLachlin CJ rejected the approach that always allows the niqab in the courtroom because it may damage the fairness of a trial and lead to wrongful convictions. McLachlin CJ found that "[w]hat is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict."[15]

Following precedents that set a test for balancing conflicting *Charter* rights,[16] McLachlin CJ designed a process of balance for this case that involved answering four questions:

> 1. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?
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> 2. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
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> 3. Is there a way to accommodate both rights and avoid the conflict between them?
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> 4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?[17]

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[9] *Ibid* at para 7.
[10] *Ibid* at para 1.
[11] *Ibid* at para 2.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid* at para 51.
[15] *Ibid* at para 2.
[16] *Deganais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12; *R v Mentuck*, 2001 SCC 76, 3 SCR 442.

With respect to the first question, McLachlin CJ found that a claim based on freedom of religion could be brought whenever the claimant holds a sincere religious belief. If the claimant has managed to manifest a sincere religious reason then the first question is answered in the affirmative: requiring the witness to remove her niqab while testifying interferes with her religious freedom.

The core of the legal analysis can be found in McLachlin CJ's answer to the second question. Based on precedents and on reference to different *Charter* sections, McLachlin CJ found that the right to a fair trial in section 11(*d*) includes the right to make full answer and defence.[18] The accused claimed that his right to a fair trial is impinged by the use of the niqab because the niqab restricts the ability to assess non-verbal cues and thus prevents effective cross-examination as well as effective assessment of NS's credibility by the trier of the facts (the judge or the jury).[19] The accused argued that communication involves not only words, but also facial cues:

> A facial gesture may reveal uncertainty or deception. The cross-examiner may pick up on non-verbal cues and use them to uncover the truth. Credibility assessment is equally dependent not only on what a witness says, but on how she says it. Effective cross-examination and accurate credibility assessment are central to a fair trial. It follows … that permitting a witness to wear a niqab while testifying may deny an accused's fair trial rights.[20]

NS claimed that the importance of seeing the witness's face is exaggerated and also that, to the extent that non-verbal cues are helpful, the niqab does not restrict the majority of them.[21]

McLachlin CJ found that although not an independent constitutional right of the accused, the general common-law rule required witnesses to testify with visible faces. She further found that this rule was based on a "common law assumption"[22] that facial cues help assess credibility. She admitted that this was a mere assumption, but argued that the assumption could only be displaced if it could be demonstrated to be erroneous. McLachlin CJ found that NS and interveners in this case did not provide sufficient evidence against the assumption.[23]

Given the common-law rule, McLachlin CJ found that covering the face may impede cross-examination[24] and credibility assessment,[25] and concluded that covering the witness's face may impact the right of the accused to a fair trial. However, she found that whether covering the witness's face actually impedes cross-examination and credibility assessment depends on the

[17] *R v NS*, supra note 3 at para 9.
[18] *Ibid* at para 15.
[19] *Ibid* at paras 16-18.
[20] *Ibid* at para 18.
[21] *Ibid* at para 19.
[22] *Ibid* at para 21.
[23] *Ibid* at paras 17, 20, 22.
[24] *Ibid* at para 24.
[25] *Ibid* at para 25.

kind of evidence the witness is asked to provide. Only if the evidence in question is contested and the witness's credibility is at issue can veiling be said to pose a "real and substantial" risk to trial fairness.[26] The answer to the second question thus depends on the nature of the evidence that the witness is asked to provide.[27]

After defining the method by which the risk to trial fairness will be assessed, McLachlin CJ moved to consider the proper solution, should both religious freedom and trial fairness be at stake. McLachlin found that the solution cannot be to deny completely one of the rights in this case.[28] A compromise should be sought that upholds both rights. But McLachlin CJ also found that

> On the facts of this case, it may be that no accommodation is possible; excluding men from the courtroom would have implications for the open court principle, the right of the accused to be present at his trial, and potentially his right to counsel of his choice. Testifying without the niqab via closed-circuit television or behind a one-way screen may not satisfy N.S.'s religious obligations.[29]

She thus answered the third question in the negative: there is no way to accommodate both rights and avoid the conflict between them.

Unable to find an alternative that upholds both rights, McLachlin CJ moved to assess the salutary effects and deleterious effects of requiring a niqabi witness to unveil. Her findings reaffirm her commitment to trial fairness and the common-law rule requiring witnesses' faces to be visible. She found that the deleterious effects of limiting a sincerely held religious practice depended on several considerations, such as the importance of the practice to the claimant and the degree of state interference with the practice in light of the actual situation in the courtroom.[30] She further mentioned broader societal effects to be considered as well, including the effect on other potential claimants and the potential harm to justice at large should they choose not to come forward with their claims, a consideration that may be especially weighty in sexual assault cases.[31] But all these heavy considerations were ultimately subordinated to what McLachlin CJ found to be the salutary effects of limiting the use of the niqab in court. McLachlin CJ found that salutary effects will include assuring a fair trial for the accused and "safeguarding the repute of the administration of justice" since "the right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble."[32]

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[26] *Ibid* at paras 27, 28.
[27] *Ibid* at para 29.
[28] *Ibid* at para 31.
[29] *Ibid* at para 33.
[30] *Ibid* at para 36 (when assessing the importance of the practice to the claimant the strength of the religious reason – rather than its sincerity – would be important).
[31] *Ibid* at para 37.
[32] *Ibid* at para 38.

McLachlin CJ did suggest that the right to a fair trial may be at greater or lesser risk in different stages of the trial or in different kinds of proceedings,[33] and with respect to different kinds of evidence that the witness is asked to provide.[34] She stressed that this list of factors is not closed and could change based on the facts of future cases as well as on future scientific evidence with regard to the importance of seeing a witness's face. But with regard to the case at hand she concluded that "where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab."[35] Thus, McLachlin CJ's answer to the fourth question was that, in this case, the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so. McLachlin CJ's right-reconciling exercise concluded in this case by dismissing the appeal and indicating that NS might be required to remove her niqab.

Concurring Reasons *per* LeBel J

In his concurring opinion, LeBel J agreed with McLachlin CJ's conclusion that the appeal should be dismissed, but for different reasons.[36] The reasons LeBel J gave were based on the importance he sees in the adversarial system as a mechanism to achieve justice and to secure rights, and on the values he defines as basic in the Canadian system.

When defining the questions involved in the case, LeBel J said:

> The Court of Appeal and the complainant treated the issue in this case as purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence. This clash arises, but the equation involves other factors. The case engages basic values of the Canadian criminal justice system. Is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?[37]

LeBel J then moved to judge the case in two steps. He first referred to the question of balancing the rights involved, and found that such a balancing process works in favour of the accused.[38] Unlike McLachlin CJ, LeBel J found that such a balancing process would work in favour of the accused in every case of conflict with the niqab. For this reason, LeBel J opted for a clear rule applying to all proceedings and to all kinds of evidence. He said:

[33] *Ibid* at paras 39-42.
[34] *Ibid* at para 43.
[35] *Ibid* at para 44.
[36] *Ibid* at para 58.
[37] *Ibid* at para 60.
[38] *Ibid* at paras 62-68.

> We should not forget that a trial is itself a dynamic chain of events. It can often be difficult to foresee which evidence might be considered non-contentious or important at a specific point in a trial. The solution may vary at different stages of a trial, and also with what is known about the evidence. What looked unchallengeable one day might appear slightly dicey a week later. Given the nature of the trial process itself, the niqab should be allowed either in all cases or not at all when a witness testifies.[39]

LeBel J then moved to define the values of the Canadian criminal justice system and to consider the effect they have on this case. He defined an "independent and open justice system in which the interests and the dignity of all are taken into consideration" as "a key aspect of the traditions grounding this democratic society."[40] LeBel J referred to a trial as "an act of communication with the public at large"[41] and as "a process of communication" within the courtroom itself.[42] This idea of "open communication" led LeBel J to find that the common-law rule requiring revealed faces justifiably limits the right of a witness to wear the niqab.

Dissenting Reasons *per* Abella J

Abella J's dissenting reasons challenge the particular rule set in the majority's decision and the approach to religious freedom that this rule expresses. As shown above, at the heart of McLachlin CJ's and LeBel J's reasons is the common-law assumption that concealing the face while giving testimony may harm the rights of the accused. In her dissenting opinion, Abella J challenged the application of the common-law rule to the niqabi witness by comparing niqabi women to other witnesses who enjoy exemption from the rule. She said:

> The court system has many examples of accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments. I am unable to see why witnesses who wear niqabs should be treated any differently.[43]

By relying on this comparative case, Abella J not only challenged both McLachlin CJ's and LeBel J's conclusions in the case of NS, but also the broader ideas on which McLachlin CJ's and LeBel J's reasons are based. She portrayed the question at hand first and foremost in terms of equality of access to justice and, by doing so, denied McLachlin CJ's view that the case involved only the right to a fair trial and religious freedom. By bringing in the comparative case she also challenged LeBel J's view that individuals accessing courts are compelled to communicate openly with all participants in the process.

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[39] *Ibid* at para 69.
[40] *Ibid* at para 73.
[41] *Ibid* at para 76.
[42] *Ibid* at para 77.
[43] *Ibid* at para 82.

Abella J started by conceding that "seeing more of a witness's facial expressions is better than seeing less," but rejected the idea that seeing less of the witness's face is so harmful to the fairness of the trial that the witness should be asked to remove her veil.[44] Abella J's reasons for rejecting this conclusion lay in the outweighing deleterious effects of requiring a niqabi woman to unveil in order to testify.[45]

Abella J described the effects of the majority's decision on a niqabi woman from the woman's own perspective. The niqabi woman experiences the command to wear the niqab as "'obligatory and nonoptional', that is, as not providing a genuine choice to the religious believer."[46] Since the niqabi woman sees herself as unable to not follow the religious command, a court's decision preventing a niqabi woman from acting according to her religion will force her to choose between pursuing justice in violation of a divine command, or foregoing justice and respecting the divine command.[47] Complainants who believe that they cannot choose to remove the veil will thus not bring charges for crimes against them, or will refuse to testify. They may also be suffering harm to their own right to a fair trial if they are not allowed to testify in their own defence when they are the accused.[48] Abella J found that this result undermines the public perception of the fairness of the justice system as a whole.[49] She further highlighted the specific damage that the rule McLachlin CJ offers will cause in cases of sexual assault, where the evidence the witness is asked to provide is always contested:

> The majority's conclusion that being unable to see the witness' face is acceptable from a fair trial perspective if the evidence is "uncontested", essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all.[50]

These deleterious effects to a niqabi woman's access to justice formed the basis for Abella J's reasons.

Abella J then moved to assess the way the niqab affects trial fairness. She found that the ideal that witnesses' demeanour should be visible to the court was often compromised, and that this compromise alone never disqualified a testimony.[51] The examples she gave included witnesses

[44] *Ibid* at paras 82, 91.
[45] *Ibid* at para 86.
[46] *Ibid* at para 93, quoting Martha C Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) at 117.
[47] *R v NS*, supra note 3 at paras 93, 94.
[48] *Ibid* at para 94. I suspect that Abella J might be making a mistake here. The accused already enjoys a right not to testify against herself (Charter, supra note 11, s 11(c)). She can thus escape the problem altogether, if she so wishes. If she wishes to testify in her own defense, why would the prosecution ask her to unveil? The accused testifying veiled is an improvement over her not testifying at all. It seems like the prosecution does not have a valid claim of harm.
[49] *Ibid* at para 95.
[50] *Ibid* at para 96.
[51] *Ibid* at paras 97-106.

who are hard of hearing, who do not speak the language,[52] who have "physical or medical limitations that affect a judge's or lawyer's ability to assess demeanour," such as witnesses who have suffered a stroke or have a speech impairment.[53] She also described situations in which evidence is accepted without the court being able to assess demeanour at all, such as a transcript of evidence from a disabled witness unable to attend court,[54] and other exceptions to hearsay evidence.[55] "[W]e are left to wonder," she concluded, "why we demand full "demeanour access" where religious belief prevents it."[56]

3) A Critique

In my critique of the decision in *R v NS* I will not challenge, in itself, the common-law rule requiring witnesses to testify with their faces revealed.[57] I will not challenge the common-law rule itself because such a challenge is not particular to the niqab and, in fact, avoids the complexities that the niqab poses in the context of the court altogether. Nevertheless, it is important to note that, when debating religious exemptions, the first task is to assess whether the rule of general application (from which an exemption is sought) is legitimate in the first place.

My critique argues that there are conclusive reasons to extend to niqabi witnesses the accommodation that some groups of witnesses receive, such as witnesses whose disabilities restrict facial cues. I argue that the *R v NS* case was decided unjustly because the majority's decision discriminated against niqabi women without proper justification. The courts accommodate witnesses whose demeanour cannot be fully assessed, but the Supreme Court refused to extend the same accommodation to niqabi women. McLachlin CJ simply supported the general common-law rule that witnesses testify with their faces uncovered but failed to account for the many cases where this rule is abandoned and to give reasons why NS would not

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[52] *Ibid* at para 102.
[53] *Ibid* at para 103.
[54] *Ibid* at para 104.
[55] *Ibid* at para 105.
[56] *Ibid* at para 108.
[57] This decision separates me from other commentators on the case. Beverly Baines criticizes McLachlin CJ for advancing the common-law assumption "for which she provided no evidence or precedent" and for refusing to weigh arguments against the assumption (Beverly Baines, "Banning the Niqab in the Canadian Courtroom: Different Standards for Judges" JURIST - Forum (24 January 2013), online: JURIST – Forum . Stephanie Voudouris criticizes directly the assumption that demeanour can be easily assessed and that the niqab hinders this assessment (Stephanie Voudouris, "Peeling Back the Court's Decision in *R v NS*" The Court (23 January 2013), online: The Court [Voudouris]). Lisa Dufraimont also argues that "[t]he weight of the empirical evidence supports the view that facial cues and other aspects of demeanour are not reliable guides in assessing the truthfulness of witness testimony"; but nevertheless finds that "the Court's cautious approach in S.(N.) appears prudent in an area where the empirical claims advanced strain against the law's basic assumptions about procedural fairness" (Lisa Dufraimont, Annotation of *R v S(N)*, (2013) 98 CR (6th) 5 at 5, 6). Faisal Bhabha criticizes the decision's adverse effect on the marginalized group of niqabi women. The core of his critique, I believe, is that the majority did not allow flexibility of procedural rules that could avoid such adverse effect (Faisal Bhabha, "*R v NS*: What's Fair in a Trial? The Supreme Court of Canada's Divided Opinion on the Niqab in the Courtroom" (forthcoming, 2013, Alberta LR) available online: SSRN [Bhabha].

be another such case.[58] LeBel J acknowledged that courts exempt some witnesses from this rule, and gave a reason for discriminating between those witnesses and niqabi woman. As I will argue below, this reason is not persuasive. Abella J's conclusion that the exemption of some witnesses form the common-law rule should be extended to niqabi women is the most persuasive position of the three.

In this chapter I will evaluate and reject the reason given by LeBel J to discriminate between niqabi women and other witnesses whose demeanour cannot be fully assessed. I will then show that the reasons for exempting disabled persons from the common-law rule of open testimony apply equally to niqabi women. These reasons support Abella J's conclusion that niqabi women should be allowed to testify veiled. Finally, I will offer an argument that I think informs the majority's decision, although it is not explicitly expressed by the majority.[59] In a nutshell, the argument makes a distinction between an individual's choices and circumstances for the purpose of deciding the extent of accommodation that individual deserves. I believe that this argument could support the majority's decision better than arguments brought forward by the majority. In this chapter I will explain the argument. In chapter 3 I will develop my own argument with regard to *R v NS* as an answer to the choice-circumstances distinction.

<u>A Critique of LeBel J's Reason to Discriminate between Disabled Witnesses and Niqabi Witnesses</u>

Why should niqabi witnesses not receive the same exemption from the common-law requirement to show one's face that witnesses with disabilities receive? How can it be justified that the rule about unveiled faces makes an exception for one group of witnesses but not for the other? The answer has to lie in a relevant differentiating factor between the two groups. My first task is to uncover this relevant differentiating factor.

LeBel J's minority concurring opinion found that the niqabi woman should be treated differently from the disabled witness because the result of each case of accommodation is different in terms of "advancing communication." As noted above, LeBel J described the credibility of the criminal

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[58] In fact, McLachlin CJ even goes further by claiming that the few supposedly exceptions to the common-law rule actually confirm the rule. She mentions two aids: permitting children to testify via closed-circuit TV – permitted because it does not prevent the accused from seeing the witness – and testifying by audio link – permitted only when the judge is satisfied that no prejudice is caused to either of the parties by the fact that the witness would not be seen by them. McLachlin CJ does not refer to other cases, to which LeBel J and Abella J refer, in which persons with demeanour-effecting disabilities or linguistic barriers are allowed to testify, cases that clearly challenge the common-law rule (*R v NS*, supra note 3 at para 23).

[59] Although McLachlin CJ ignored the analogy with disability made by both Abella J and LeBel J, I assume that the claims that some classes of witnesses are accommodated by courts even though their demeanour is hard to assess are correct. For the purposes of my argument I assume that this judicial reality is not merely tolerated by McLachlin CJ but also found justified by her. In fact, as Abella J notes, some of the exceptions Abella J refers to were ordered by McLachlin herself (*Ibid* at para 105, quoting McLachlin J (as she then was) in *R v Khan*, [1990] 2 SCR 531, 41 OAC 353). McLachlin CJ's judgment that a niqabi woman might be ordered to unveil, therefore, differentiates between other witnesses whose demeanour cannot fully be assessed and niqabi witnesses. This differentiating treatment should be justified. The possible reasons I explore here are meant to fulfill this justification requirement.

justice system as dependent on a process of open communication. LeBel J then referred directly to exceptions to the "openness" rule accepted in courts:

> To facilitate this process [of communication], the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings. Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqab, on the other hand, does not facilitate acts of communication. Rather, it restricts them. It removes the witness from the scope of certain elements of those acts on the basis of the assertion of a religious belief in circumstances in which the sincerity and strength of the belief are difficult to assess or even to question. The niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors.[60]

LeBel J then finds that exceptions to the common-law rule are justified when the overall aim of communication is promoted, and he believes that this is true of cases involving witnesses who are blind or deaf, or witnesses with limited mobility, but not true of cases involving the niqab.

LeBel J's reason for discriminating between disabled witnesses and niqabi witnesses is unpersuasive. First, he made a mistake with regard to the alternatives he considered in the analogy of the two cases. Second, the baseline LeBel J used to compare the two cases fails to respect NS's religious freedom. These two moves lead him to the erroneous conclusion that it is justified to discriminate between the two groups. Third, the reasons for making the exception for witnesses with "handicaps" in the first place are equally applicable to niqabi witnesses. LeBel J failed to recognize this fact.

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

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[60] *R v NS*, supra note 3 at para 77.

Now consider the analogous alternatives in the case of the niqabi witness. A fair and comprehensive analogy must follow carefully the steps taken in the case of the witness with a disability. In the first alternative, the niqabi witness will not be allowed to testify wearing the niqab. In this alternative it should be considered that the result may be that at least some niqabi women will choose not to testify.[61] This alternative does not facilitate communication in the same way that not allowing a disabled witness to testify does not facilitate communication. LeBel J neglected to consider this option. But this is a very realistic possibility. It is most realistic especially since, as noted by Abella J, religious persons experience religious commands as mandatory and hence a rule requiring them to neglect a religious practice in order to participate in a certain activity will be experienced by them as compelling them to not participate in the activity.

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

> [T]he lower Court correctly acknowledged that the truth seeking function of the criminal trial may be subverted by requiring N.S. to testify without her niqab, given the unreliability of her demeanor when stripped of her niqab in public, possibly for the first time in eight or more years: "without the niqab, N.S. would be testifying in an environment that was strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be misled by her demeanor" (para.81). Indeed any witness would behave differently if asked to testify without, for example, his or her shirt on.[62]

LeBel J failed to take this possibility into consideration as well. LeBel J only envisioned one option, where the niqabi witness both proceeds to testify without her niqab and her demeanour is not affected by her being unveiled. LeBel J's conclusion was based on his mistaken assumption that this is the sole option.

I find the assertions that at least some niqabi women will not testify unveiled at all or that their testimony will be unauthentic very persuasive. Considering these two alternatives makes it clear how allowing a niqabi woman to testify wearing her niqab does, in fact, facilitate communication. Thus it is this alternative that should be equated with "the efforts to overcome these obstacles [posed by handicaps]" to which LeBel J refers.

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

[62] *R v NS*, 2012 SCC 72, (sub nom *R v SN*) 353 DLR (4th) 577 (Factum of the Intervener Women's Legal Education and Action Fund), online: LEAF at para 12 [FOI LEAF]. Voudouris uses the same idea as one basis for her criticism of the decision, *supra* note 57.

The second objectionable move that LeBel J made is related to his first mistake noted above but is even more fundamental and reflects an underlying negative attitude toward the niqab. In constructing the two comparative cases of the disabled witness and the niqabi witness, LeBel J compared the efforts to overcome obstacles posed by disabilities to the wearing of the niqab. LeBel J then said that "the efforts to overcome these [disability-related] obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqab, on the other hand, does not facilitate acts of communication."[63] By constructing the comparison in this way, LeBel J inevitably reaches the conclusion that the niqab should not be accommodated.

To decide whether an accommodation is appropriate, LeBel thinks it is necessary to answer one question: Does this accommodation improve or impede communication? This question is inherently comparative: it compares the communicative results of the accommodation with communication under some default or baseline condition in the absence of accommodation. If communication is better with the accommodation than it is in the baseline case, then the accommodation is appropriate. When persons with disabilities approach the court, the baseline is the kind of testimony that they can give with their disability. The court then tries to facilitate communication by finding an improvement over this baseline. With disabilities, the baseline is rather clear: LeBel J does not consider the baseline to be the testimony that the disabled person would give if that person were fully able-bodied. Relative to such a ludicrous baseline, even the most effective measures to improve communication in testimony may still yield a loss in terms of communicative effectiveness. And if they could only yield a loss, then according to LeBel J's reasoning, that would count against accommodating the disabled person, and maybe also against allowing the disabled person to testify. But with niqabi women, the baseline is less clear and intuitive. With a niqabi woman, the two possible baselines are, first, where a niqabi woman communicates wearing her niqab, and second, where a niqabi woman communicates without her niqab. Measured relative to the latter baseline, accommodation of niqabi testimony may still count as a loss of clarity in communication, in the same way as accommodation of disabled witnesses would count as a loss relative to a baseline where the disabled witness is not disabled. While this comparison was obviously an irrelevant consideration in the case of disabled witnesses, LeBel J focuses exclusively on this comparison in the case of niqabi witnesses, neglecting to consider the other possible baseline – the baseline that seemed most plausible in the case of disabled witnesses – where the niqabi woman approaches the court wearing her niqab. From this baseline, accommodation can clearly count as a gain in communication.

A respectful treatment of NS's religious freedom would recognize that she is approaching the court wearing the niqab as part of her, even if the final result of the legal analysis would limit the niqab in court. Respect for NS and her rights demands that the baseline for comparison should recognize that she is approaching the court wearing the niqab, that the niqab is a part of her, and that the court has to justify its removal should NS be required to unveil. NS's religious freedom,

[63] *R v NS*, *supra* note 3 at para 77.

though it is not absolute in the sense that she is not immune from removing the niqab in certain cases, entitles her to demand that the baseline for consideration in court, from which departures must be justified, is one where she wears the niqab. LeBel J's refusal to recognize NS in this light fails to respect her religious freedom. While concluding that NS might be required to remove the niqab in certain circumstances is not in itself disrespectful, redefining her as approaching the court unveiled, in strike opposition to the life that she leads out of religious conviction, is disrespectful. The attitude reflected is not one that asks to limit the niqab where it is harmful to others but one that does not recognize the general right of a woman to don the niqab.

A closer look at McLachlin CJ's and LeBel J's lines of argumentation may be helpful to explain why LeBel J's treatment is unjustified. McLachlin CJ followed four steps, the first of which clearly recognized that NS's religious freedom will be interfered with if she is required to unveil in order to testify.[64] McLachlin CJ then proceeded to conclude that NS may nevertheless be required to unveil. But the baseline McLachlin CJ worked with was that NS is veiled as part of her protected religious belief. Unlike McLachlin CJ, LeBel J did not follow a well-ordered multi-staged process of analysis and never explicitly recognized in his treatment of the case the fact that NS's religious freedom was interfered with by his conclusion. Nevertheless, the title of the section in which he made his core argument is "Conflict Between Religious Rights and the Criminal Justice Process,"[65] and in his only passing reference to NS's religious freedom he says "I do not cast doubt on the sincerity of the appellant's religious beliefs."[66] LeBel J, then, was aware of the fact that NS's religious freedom would be affected by any measure not allowing her to testify in her niqab. He did recognize that she had a claim based on religious freedom. This acknowledgement should have meant that NS is perceived as approaching the court wearing the niqab, just like a disabled person approaches the court disabled.

<u>Reasons Not to Discriminate Between Disabled Witnesses and Niqabi Witnesses: Equal Access to Justice; Equal Criminal Responsibility</u>

The third flaw in LeBel J's decision is his failure to recognize that access-to-justice reasons to abandon the common-law rule of open testimony in the case of a disabled witness extend to a niqabi witness as well. As noted above, LeBel J said:

> To facilitate this process [of communication], the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings.

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[64] *Ibid* at paras 10-14 (a section titled "Would Requiring the Witness to Remove the Niqab While Testifying Interfere With Her Religious Freedom?" in which McLachlin CJ established that in order to base a claim on the guarantee of religious freedom in s 2(*a*) of the Charter a claimant must show a sincere religious belief and where she declared that she proceeded on the assumption than NS has established a sincere religious belief).
[65] *Ibid* at para 62.
[66] *Ibid* at para 65.

> Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process…[67]

This confusing quote suggests two alternative reasons to assist witnesses to overcome disability-related difficulties. The first reason to do so is in order for them to gain access to justice. This newly gained access to justice in turn facilitates the process of communication that is the trial simply by including more members of the public as participants in the process. The second reason to assist witnesses to overcome disability-related difficulties is because the efforts to overcome these obstacles tend to improve communication. The discussion in the section above was dedicated to this latter alternative reason. The discussion in this section is dedicated to the former reason for exempting disabled witnesses from the open testimony common-law rule: to allow them access to justice. I argue that this reason equally applies to niqabi witnesses.

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

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

Section 24(1) applies only in the context of the *Charter* to rights and freedoms guaranteed by the *Charter* and to the relationship between individuals and the state. It thus does not guarantee a general right to access justice. Other laws create rights between individuals and between individuals and the state and also create specific avenues to access justice should rights be infringed. But the *Charter* exemplifies here a broader principle of access to justice, the idea that rights and obligations must be, as a matter of justice, complemented with an avenue to enforce them.[68]

Access to justice is one of the most effective means to guarantee all other rights. The guarantee that, should your right be violated, you can approach the courts and receive a remedy is, to a great extent, what deters potential violators from violating your rights in the first place. The right to security of the person,[69] for example, will mean nothing (at least in a legal sense) if it is merely an unenforceable statement that others should not intervene with one's body. This right

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[67] *Ibid* at para 77.

[68] On the centrality of access to justice as a principle of the rule of law see e.g. Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 216-217.

[69] Here I refer not only to the right to security of the person that is protected by the *Charter*, s 7, but also to the more general right to security of the person that is the source of different legal obligations, mainly in criminal law, not to harm others. Section 271 of the Criminal Code, RSC, 1985, c C-46, criminalizing sexual assault, is an example of a legal obligation not to harm others that protects the right to security of the person.

receives actual protection only when the police attempts to assure that violations do not happen ex ante and the courts provide remedy ex post. In the unfortunate case where a violation has happened, the right is protected when the judicial system holds the violator responsible. In many cases, and in all cases of sexual assault, testimony is necessary for holding the alleged assaulter responsible for violating the victim's security of the person. For this reason a decision with regard to the acceptability of the testimony in this case has an actual bearing on the victim's right to security of the person.

If access to criminal justice is not guaranteed to disabled witnesses because their demeanour cannot be fully assessed, then potential violators will be less deterred from violating the rights of disabled persons comparing to the rights of others who enjoy access to criminal justice. This deleterious effect on disabled persons' rights is one reason for courts to accept disabled persons' evidence although their demeanour cannot be fully assessed. Another reason for such exception is a consideration of equal criminal responsibility. Not allowing the exception would mean that some criminals will be held less accountable than others not because the nature of their crime is different but because of irrelevant characteristics of their victims.

The same considerations apply to niqabi women. If they are not allowed to testify wearing the niqab then their access to justice is compromised, either because they might not testify at all or because their testimony might be less than authentic. This disenfranchisement also means that they are more vulnerable to assault than the next person because their assaulter can anticipate suffering less from the hand of the law. A rule requiring that the accused should have unmitigated access to the accuser's non-verbal cues adversely affects both groups – disabled persons and niqabi women – in the same manner and to the same extent.

The portrayal above shows that more is at stake in the case of *R v NS* than is admitted by the majority. The majority considered the niqab as creating a conflict between two *Charter* rights: NS's religious freedom vis-à-vis the accused's right to a fair trial. The majority reached the conclusion that NS might be required to remove her niqab based on the argument that an alternative accommodating both rights may be unattainable and that the accused's right to a fair trial would suffer more than the religious freedom of NS. The minority concurring opinion and the dissenting opinion noticed that more issues are at stake than merely the two conflicting rights. Both opinions referred to cases where the accommodation of a witness with a disability would hinder the accused's right to a fair trial in the same way as would accommodating a niqabi woman. This referral to other cases shows that the real issue at stake is access to justice and, in this case, the right to security of the person that access to justice protects. I find, then, that not respecting NS's religious freedom will result in an unequal access to justice and in unequal protection of her right to security of the person.[70]

[70] Both FOI CCLA (supra note 61) and FOI LEAF (supra note 62) portrayed the case in terms of the rights to security of the person (*Charter*, s 7) and to equality (*Charter*, s 15). As noted above, Abella J's reasons also convey the message that discriminating between disabled witnesses and niqabi witnesses will violate equality rights.

Implied Reasons of the Majority

I have shown that the distinction between disabled witnesses and niqabi witnesses drawn by LeBel J is not persuasive. The distinction based on the consideration of communication makes acute mistakes in the analogy between the cases, it is initiated from a position disrespecting the niqabi woman's religious freedom, and it fails to acknowledge that the reason to exempt disabled witnesses from the common-law rule of open communication applies equally to niqabi women. I said that there is a way to draw a distinction between handicaps and the niqab that is more persuasive than the reason LeBel J provided.

One could argue that although considerations of justice point to similar conclusions in both cases of disability and the niqab, there is a reason to make the effort to facilitate communication in the case of a witness with a disability while denying such facilitation to the niqabi witness. Indeed, I believe that both McLachlin CJ and LeBel J are making such an argument, even though in not so many words. I believe that their insistence on the common-law rule requiring an open testimony and their resistance to allowing niqabi women an exception from the rule similar to the exception allowed to witnesses with disabilities are based on a distinction they make between *chosen behaviour* and *non-chosen personal characteristics*.

According to an argument distinguishing choices from circumstances, the niqab is not equivalent to a disability because the niqab is a choice while a disability is a condition. A niqab is a behaviour, and – technically speaking – the niqab can be removed; the niqab wearer can choose to not wear it. Disability, on the other hand, is a circumstance, a condition beyond the power of volition of its subject. A witness with a disability cannot choose to become able for the time of her testimony, whereas a niqabi witness can choose to unveil for that time. According to this argument, disabled persons suffer from unequal access to justice if their disability is not accommodated while niqabi women do not. According to this argument the voluntary nature of donning the niqab versus the non-voluntary nature of disability is the relevant factor justifying the discrimination between the two cases.

According to the argument discriminating between choices and circumstances, the niqabi woman in fact has equal access to justice, but she chooses not to exercise it. This choice is her right but, if the niqabi woman will not testify without her niqab, she has no complaint against others with respect to the choice's consequences in terms of access to justice. If she is worried about the adverse effect on her access to justice, she is free to avoid this effect. The argument implied by the choice-circumstance dichotomy is that a person who voluntarily chooses a course of action takes upon herself the consequences of her action while a person limited by circumstances is not responsible for such consequences. The argument is applying the 'Volenti non fit inuria' maxim, according to which a person who consents to an effect on him cannot be seen, legally speaking, as harmed by the same effect.[71] In this case, NS chose the niqab, thereby consenting to the

[71] Joel Feinberg, "Legal Paternalism" (1971) 1:1 *CJ Phil* 105 at 106-107.

effects the niqab will have on her life. Her choice and consent mean that when NS is affected by the consequences the niqab has in the context of the trial she cannot claim to be harmed by those consequences.

The argument distinguishing between choices and consequences is interesting and not without merit. I will dedicate the next chapter to exploring the argument, defending it to a certain extent, and drawing its conclusions with respect to the extent of religious freedom at large and accommodating the niqab in particular. I will argue that although correctly characterized as a choice, a religious practice nevertheless deserves protection. This simply follows from the norm of religious freedom. In the case of NS, her choice to don the niqab does not justify her exclusion from testimony. The reason is that NS is compelled into the situation by the acts of her assaulter and by the monopoly of the state on the administration of justice. Whereas I believe the religious person's choice to practice her religion does put the responsibility on her to live with some consequences of her choice, this can only be the case with respect to activities in which she can meaningfully choose to participate or not to participate. This line of thought will be explored in chapter 4.

4) A Meaningful Choice to Practice One's Religion

R v NS was effectively decided based on a distinction between unfavourable circumstances like a disability, and personal choices like the religious practice of donning the niqab. While it is true that religious practice is a choice, and while it might be true that circumstances and choices deserve different legal treatment in some contexts, merely pointing to these two facts does not justify the ruling in this case. If religious freedom is to mean anything, it has to protect some choices to practice religion.

The law commonly distinguishes between choices and circumstances. For example, as Carissima Mathen notes, the distinction between choices and circumstances commonly plays a prominent role in non-discrimination jurisprudence. When claimants approach the court with a request to receive a benefit under a certain law, the court checks to which group of persons the law applies. If the claimants do not compose part of the group by virtue of the claimants' choice, the court does not consider the law to be discriminatory. Such, for example, was a case reaffirming the exclusion of common-law partners from a property-division regime designed for married couples. The court justified the rule by claiming it was respecting the autonomous exercise of the individual's choice not to marry.[72]

But a rejection of a request for religious exemption that is focused on the fact of choice does not sit well with any conception of religious freedom. If religious freedom is to have any meaning, it

[72] Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 *JL & Equality* 163 at 172-73 [Mathen]. The example of the case refers to *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325.

has to protect choices to practice religion. Otherwise, religious freedom is limited to the freedom to belong to a religious group. This definition is not only redundant in a system that already prohibits discrimination on the basis of belonging to a religious group (as in Canada, under section 15 of the *Charter* and in equality jurisprudence). It also empties even belonging in a religious group of most of its meaning. It is hard to imagine what belonging in a religion means without the freedom to act upon religious conviction. Religious choices merit a different treatment than other personal choices. Choices made based on religious commitments cannot be merely dismissed by being equated with other non-protected choices and contrasted with personal circumstances if religious freedom is to have any meaning at all.

The notion that religion is a choice may be helpful in understanding why religious freedom is, like all other rights, not absolute, and why not every request for accommodation based on religion should be fulfilled.[73] But this notion in itself is unhelpful in generating a decision-making principle that will guide us in determining *which* requests for accommodation should be accepted. For the purpose of defining a principle to determine when accommodation of religious needs will be granted, a more useful principle is that of a "meaningful choice," offered by McLachlin CJ in *Hutterian Brethren*.[74] As I will argue in this chapter, the idea of "meaningful choice" supports always accommodating the niqab in court.

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

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

> Hence the idea of political legitimacy based on the criterion of reciprocity says: Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.[75]

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[73] Note that not every request for accommodation of a disability will be granted either.
[74] *Supra* note 5.
[75] John Rawls, "The Idea of Public Reason Revisited" (1997) 64:3 *U Chicago L Rev* 765 at 771 [Rawls].

Public reason is the commitment of a liberal democracy to only pass laws and policies that are justified by reasons that each member of society can be reasonably expected to reasonably accept.[76] By doing so, liberal democracy hopes to fulfil the ideal that persons with different personal conceptions of the good can live together. Public reason is required by the ideals of liberty and equality, the two foundations of a liberal democracy. Public reason fulfils the requirement of liberty by providing citizens with reasons for action that each citizen can reasonably adopt as her own. A citizen is not only expected to follow rules because the state has the power to enforce them but because these rules are justified by reasons that the citizen can reasonably adopt as her own. In that sense the citizen can be said to be autonomous, fulfilling the ideal of liberty. As Rawls says, "[public reason] is a relation of free and equal citizens who exercise ultimate political power as a collective body."[77] Public reason fulfils the requirement of equal respect by providing to *all* citizens reasons that they could reasonably accept.

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

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

By translating the divine command into the language of the pursuit of the good, a religious person can give a public reason for the protection of practices that are mandated, in her eyes, by divine command. Religious reasons can therefore be translated into public reason, but the requirement of reciprocity means that personal reasons are not absolute. Persons are entitled to exercise their liberty only when the liberties of others are preserved. Religious reasons therefore lose the absolute power of the divine command.

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[76] T M Scanlon, when discussing morality and not merely justice, makes a similar claim that an action is right if it can be justified to others by reasons that they could not reasonably reject. See T M Scanlon, *What We Owe to Each Other* (Cambridge, MA; London: Harvard University Press ,1998).
[77] Ralws, supra note 75 at 769-770.

When they lose their absolute power, religious reasons become choices. This is not a unique feature of religious reasons. All personal reasons, to suffice the requirement of reciprocity, lose their absolute command when the liberties of others are at stake. The requirement to give reasons to others who do not share adherence to the divine command (or to any other philosophical categorical imperative) results in abandoning the absolute justificatory force of the divine command and replacing it with the justificatory force of liberties at large. The commitment to equal liberty inevitably results in the characterization of private reasons as choices in the sense that the private reasons of one individual are not recognized as creating an obligation that the polity has a reason to respect to the fullest.

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

> The value of liberal democracy is its willingness to cherish religious freedom as a valuable part of the freedom of any autonomous individual. Where it fails is in its inability to fully recognize that religion is (or, at least, may be) more than a mere choice on the individual's part. Rather, it is a radically different but equally valid mode of experiencing reality. As long as the religious adherent's practices are private, or public but minimally intrusive, they are accepted; but where these conditions do not apply, where the beliefs are taken so seriously as to interfere with the liberal understanding of the public good, the liberal state views religion as a choice that is wrong, unreasonable, or dangerous, according to liberal epistemology, and so denies the possibility of co-existence.[78]

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

Liberty and equality call for the protection of religious freedom. This could be explained by repeating, to a certain extent, the debate regarding the translation of religious reasons into public reasons presented above. The most valued interest in a person’s life is to lead the good life as the person sees it. Religion fulfils this goal for believers by providing a moral theory and ideas about the world, the meaning of life, and the relationship between the person and others around her. Religion informs conscience and identity.[79]

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

[79] *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at p 759, 35 DLR (4th) 1 at 759 (*per* Dickson CJ: The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.)

Rights, understood as basic interests that everyone has a reason to protect, provide public reasons to form laws and policies that uphold them. For this reason Rawls claims that "[t]he criterion of reciprocity is normally violated whenever basic liberties are denied", religious freedom being one of these basic liberties.[80] Rawls thus affirms that a realm of basic liberties is demanded by the idea of public reason itself.

I find then that the notion of religion as a choice does not help, in itself, in determining the extent to which religious practice should be accommodated in a liberal democracy. Religion is understood as a choice in the sense that it cannot have an absolute power to override the rights of others and in the sense that it does not offer others reasons to accept such overriding power. But religion merits accommodation that suits the strong normative power of religious freedom in Canadian society, both theoretically speaking and as a matter of positive law. The discussion above shows that not every request for accommodation of religious practices should be fulfilled. But it does not offer any principle to suggest where or when we should stop short of accommodation. My interest is in revealing exactly such a principle. To do so, more content has to be given to the notion of "choice."

<u>What Costs Should be Borne by Society and What Costs Should be Borne by Religious Persons?</u>

Alberta v Hutterian Brethren of Wilson Colony[81] is most helpful for the purpose of developing a principle regarding the extent of accommodation for religious practices. Like *R v NS*, *Hutterian Brethren* deals directly with the question of accommodating religious needs where others' rights are involved and affected by possible accommodation. The decision of McLachlin CJ in *Hutterian Brethren* sensitively takes into account the interests at issue and skilfully balances the needs of religious persons and those of the public at large to create what I find to be a usable decision principle. After presenting McLachlin CJ's ruling, I will argue that the correct application of this ruling in the case of *R v NS* would mean always allowing niqabi witnesses to testify wearing their niqab.

Hutterian Brethren involved a regulation in Alberta imposing a universal photo requirement for all driving licences and abolishing a previously existing exemption for religious needs. The aim of the new regulation was to combat identity theft. The province proposed to lessen the impact of the new requirement by allowing the members of the Wilson Colony, Hutterites who "[sincerely] believe that the Second Commandment prohibits them for from having their photograph willingly taken,"[82] to carry licence cards without a photo. But the province insisted that a photograph of all drivers, including members of the Wilson Colony, be taken and placed in a data bank. The proposal was rejected by the members of the Wilson colony. Instead, they proposed that no photo of them be taken and that the driver's licence issued to them be deemed not a valid form of proof for identification purposes. The province rejected this proposal. The

[80] Rawls, *supra* note 75 at p 771.
[81] *Supra* note 5.
[82] *Ibid*, *per* McLachlin CJ at para 7.

constitutionality of the regulation was then challenged by members of the Wilson Colony on the basis of section 2(*a*) of the Charter.

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

> Freedom of religion presents a particular challenge in this respect because of the broad scope of the Charter guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.[83]

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

> The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice . . . Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law. . . The absence of a meaningful choice in such cases renders the impact of the limit very serious.
>
> However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue. The Charter guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful

[83] *Ibid* at para 36.

> choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.[84]

McLachlin CJ's ruling is important for the debate over religious freedom in that it takes as given that religion is a choice subject to limitation, i.e. not absolute, and in that it offers a decision-making principle for requests for religious exemptions.

The *Charter* protection of religious freedom is taken by McLachlin CJ to mean that sincere believers deserve to be able to practice their religion without bearing severe costs. Their choice to practice their religion is protected. The debate then moves to assess which costs are so severe that religious persons are not expected to bear them, and which costs are incidental and are expected to be borne by religious persons.

In determining which costs effectively deprive religious adherents of a "meaningful choice" to practice their religion and which do not, McLachlin CJ considered the kind of activity that the religious person asks to participate in while at the same time practicing her religion to the full extent. McLachlin CJ referred in her decision to a number of examples, from compulsory legal requirements, to rules governing participation in the labour market, to rules applies in public education. In these examples, she found that non-accommodation of religious needs while deprives the religious person of "a meaningful choice as to the religious practice."[85]

In the case at hand, McLachlin CJ found that a requirement to take a photograph in order to obtain a driver's licence did not deprive members of the Wilson Colony of "meaningful choice to follow or not to follow the edicts of their religion."[86] She distinguished between the different activities based on their being obligatory and thus creating rights versus being chosen and thus creating privileges. First, McLachlin CJ found that there is no obligation in law to be photographed; being photographed is only a condition for participating in a chosen activity, in this case in driving. Thus "[d]riving automobiles on highways is not a right, but a privilege."[87] The definition of driving as a privilege and not a right plays an important part in the argument. First, defining driving as a privilege highlights the fact that there is no obligation in law to obtain a driver's licence. If the law obliged persons to obtain a driver's licence, it could be said that they have a right to equal access to obtaining the licence (as in Multani). Since there is no obligation, a right to equal access does not exist. The term "privilege" here means that the onus is on the person to meet the standard set by the state and not on the state to meet a standard of accommodation.

Second, the definition of possessing a driver's licence as a privilege marks the fact that driving is not a basic need. There could be activities not mandated by law but nevertheless vital for one's subsistence. Such an activity is, for example, participating in the labour market. Faced with such

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[84] *Ibid* at paras 94-95.
[85] *Hutterian Brethren*, supra note 5, at para 96.
[86] *Ibid* at para 98.
[87] *Ibid*.

basic needs that are fulfilled through private interactions, the state may be compelled to assure equal access to the activity. But McLachlin CJ found that driving is not one of the activities that fulfil basic needs. McLachlin CJ was not persuaded by the Hutterites' claim that their lifestyle is dependent on being able to drive themselves.[88] McLachlin CJ further highlighted the fact that the Hutterites had an alternative available to them: to hire others to drive for them. This alternative would uphold the general interest in security and the Hutterite's religious freedom without causing them the deleterious effects they claimed. The availability of such an alternative is another reason to define driving yourself as a privilege and not a right. For all these reasons Mclachlin CJ concluded that non-accommodation will not present the Hutterites with "an invidious choice: the choice between some of its members violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand."[89]

Hutterian Brethren is widely criticized. Whichever argumentative route commentators take, most of them find the decision unjust because they find that the claims to harm made by the Colony members were not adequately taken into consideration. Many commentators side with the dissenting opinion of Abella J, who found that the adverse effect on Hutterites will be "dramatic" since the Colony members' "inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community."[90]

Defending the specific balance struck by McLachlin CJ is beyond the scope of this thesis and is unnecessary for my purposes. My claim is simply that the definition of "meaningful choice" made by McLachlin CJ expresses the liberal notion of reciprocal rights. Mike Madden thinks that McLachlin CJ's statement that "many religious practices entail costs which society reasonably expects the adherents to bear"[91] suggests that

> [T]he real issue in a religious freedom proportionality analysis is whether a majority of the larger societal population is willing to tolerate the claimants' religious practice or belief – an idea that seems to run contrary to the purpose of entrenching a constitutional right to freedom of religion.[92]

I disagree with this interpretation. Madden takes issue with McLachlin CJ's referral to "society" and interprets it to mean "the majority." But the liberal reciprocity principle means that each and every member of society can reasonably expect adherents to bear some costs of their religious choices, including adherents themselves. Thus, McLachlin CJ's words do not convey the idea of

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[88] *Ibid* at para 97.
[89] *Ibid*.
[90] *Ibid* at para 114.
[91] *Hutterian Brethren*, *supra* note 5, at para 95.
[92] Madden, *supra* note at 76. For critiques of the decision see e.g. Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of Alberta v. Hutterian Brethren of Wilson Colony" (2011) 56:3 McGill LJ 719 (A critique of the decision's focus on the final step of the Oakes test); Madden, supra note 90 (A critique supporting Abella J's dissenting opinion); Mark Witten, "Rationalist Influences in the Adjudication of Religious Freedoms in Canada" (2012) 32 WRLSI 91 (A critique of the majority's failure to comprehend religious claims); Mathen, supra note 81 (Calling the case "a loss under section 2(a)").

a majority expressing limited willingness to tolerate religious practices. Rather, her words put in practical terms the consequences of a commitment to a liberal system of reciprocal rights.

McLachlin CJ's discussion of a "meaningful choice" provides a workable principle to apply to all requests for accommodation of religious needs. Applying the concept of a "meaningful choice" as it is presented in *Hutterian Brethren* to the case of *R v NS* shows that NS should be allowed to testify wearing her niqab. NS should be allowed to testify veiled because she is obliged to testify, because she has a right to access justice, and because she is accessing justice to protect her rights. Firstly, NS is obligated to testify in two ways. NS did not choose to approach the court; she was compelled to do so by her assaulters when they violated her basic right to security of the person. Once her right was violated, the only way to restore her interest in her security of the person was by approaching the justice system and securing a remedy in the form of a trial and possible conviction.[93] NS's testimony is imperative in this process. It should be considered that there is no alternative available for NS to secure her interest in justice. The state has a monopoly over the legitimate use of force, punishment and the administration of justice. If NS wishes to secure her rights, her only avenue is approaching the court.

Secondly, once she reported the crime and a trial was set, NS was called to testify by the prosecution, and she is required to provide her testimony.[94] This is an obligation by law which, according to the principle articulated by McLachlin CJ, creates a right for equal access. NS's niqab should be accommodated because she did not choose to participate in the trial in more than one sense. Refusing to accommodate NS's niqab while she exercises her right to access justice deprives her of a meaningful choice to practice her religion in another sense as well. NS's is not a case of an "inability to access conditional benefits or privileges conferred by law" but a case of inability to access the non-conditional fundamental right of access to justice.

In discussing s 24(1), McLachlin CJ said: "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[95] This is important to bear in mind in the case of NS. A ruling that does not allow her to testify wearing her niqab does not only render her basic right to security of the person unenforceable and thus nonexistent, but potentially erodes all her rights. As Faisel Bahaba puts it, "despite citing values of diversity, inclusion and access to justice, the majority's analytical framework leads to the inevitable result that women like NS will find themselves outside of Charter protection."[96]

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

[94] Criminal Code, RSC, 1985, c C-46 s 698 (Section 698. (1) provides: "Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence." Section 698. (2) allows a competent court to issue a warrant that person be arrested and brought to give evidence).

[95] *R v 974649 Ontario Inc*, 2001 SCC 81, 3 SCR 575 at para 20.

[96] Bhabha, *supra* note 57 at 10.

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

> The … formulation of trial fairness in the majority's judgment emphasized systematic and institutional integrity. This view concentrated on public interest considerations and prioritized the maintenance of confidence in the criminal justice system as a whole. Yet, the majority's consideration of the public interest was remarkably narrow, focussing [sic] almost entirely on the public perception of the treatment of the accused in the trial process. Fairness was defined as an abstract and idealized standard of accuseds' [sic] rights, with little consideration of the perspectives of other participants in the trial such as victims of sexual assault or vulnerable members of the public.[97]

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

According to the "meaningful choice" standard set for accommodation of religious needs by McLachlin CJ in *Hutterian Brethren*, NS should be allowed to testify wearing her niqab. NS is compelled to participate in the trial and the interest of NS in this case is in itself protected as a right to access justice that is the guarantee for all other rights and a pillar of the justice system. As Abella J said:

> The majority's conclusion that being unable to see the witness' face is acceptable from a fair trial perspective if the evidence is "uncontested", essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all.[98]

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[97] *Ibid*.
[98] *R v NS*, *supra* note 3 at para 96.

5. Conclusion

The paper presented *R v NS* as an example for a legal debate of a request for religious exemption. I hope I showed that the case is interesting for a number of reasons. First, the deep disagreement between justices regarding how to approach the case, what rights are involved and the effects of granting or denying religious exemption in this case. Second, the possibility, exemplified here by LeBel J's opinion, to redefine the rule of general application and its purpose and by thus to change the debate of the request for religious exemption. Third, the concentration of the majority and concurring opinions on the fact that religious practice is chosen as a basis for their decisions.

Following Canadian jurisprudence in the same area of religious exemptions, I suggested that *R v NS* would have been better decided if the principle of meaningful choice had been applied to it. When a request for religious exemption is debated, it is useful to consider the kind of activity the religious person is asking to participate in and the effect that not being able to participate in such activity may have on that person. I hope I have demonstrated the potential of the meaningful choice principle to resolve cases of requests for religious exemptions in a manner that balances religious freedom with other rights.