RELIGION AND EQUALITY RIGHTS: A FEMINIST FRAMEWORK

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1 See Appendix 1 for a list of Symposium participants.

Introduction

In recent years, government and judicial attempts at balancing women's equality and freedom of religion have received significant attention in the media, and have generated considerable dialogue within civil society. This Report is LEAF's contribution to the dialogue on this important issue.

The Women's Legal Education and Action Fund (LEAF) commissioned this Report as part of a larger project that addresses the perceived tension at the intersection of women's equality, religious freedom and group rights in Canada. This project included a public conference and education outreach event entitled "What is Barbaric? Feminist Reflections on Religion and Equality", which took place in Toronto on January 29, 2015. Following this, on January 30, 2015, there was a day-long symposium of leading scholars, practitioners and community activists working in the area of constitutional law, equality rights, and religious freedom. At that symposium, concerns were raised about the federal government's *Zero Tolerance for Barbaric Cultural Practices Act*,[2] in particular with regard to its implications for women's equality rights, and its impact on immigrant women, racialized women and religiously observant women.

This Report, informed by the discussions, insights, analysis and knowledge mobilization generated over the course of this two-day event, as well as by supplementary research conducted since that time, provides an overview of the legal landscape at the intersection of equality and religious freedom in Canada. In Part I, the Report outlines LEAF's work to date on gender equality and religious freedom. In Part II, the Report draws on that work, as well as insights gained from the January 2015 event and subsequent research, to present a coherent framework for analyzing these issues grounded in four main principles: substantive equality, intersectionality, inclusivity, and challenging norms. This framework will guide future LEAF efforts in this area, to help ensure that LEAF continues to approach these issues in a way that respects and promotes the rights of all women. In Part III, the Report deploys the framework to analyze three important Canadian cases concerning women's equality rights and religious freedom: *Bruker v. Marcovitz*[3]*; R v NS*[4]*; and Ishaq v Canada (Citizenship and Immigration)*.[5] Finally, in Part IV the framework is applied to critique two recent legislative initiatives on these issues: the Quebec Charter of Values (Bill 60)[6] and the federal Zero Tolerance for Barbaric Cultural Practices Act.

2 At the time of the symposium, this Act had not yet been passed. It is now the ***Zero Tolerance for Barbaric Cultural Practices Act,*** SC 2015, c. 29 ["BCPA"]. It received Royal Assent on June 18, 2015.
3 ***Bruker v Marcovitz***, 2007 SCC 54, [2007] 3 SCR 607 [**"*Bruker*"**].
4 ***R v NS***, [2012] 3 SCR 726 ["R v NS"].
5 ***Ishaq v Canada (Citizenship and Immigration)***, 2015 FC 156, 381 DLR (4th) 541 [**"*Ishaq*"**]; ***Canada v Ishaq***, 2015 FCA 194 [**"*Ishaq* Appeal"**].
6 Bill 60, Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Women and Men, and Providing a Framework for Accommodation Requests, National Assembly, 1st Section, 40th Leg, 2013, cl 3 [**"*Quebec Charter of Values*"**].

PART I. LEAF's Contributions to the Discourse on the Perceived Conflict between Gender Equality and Religious Freedom

LEAF is a national, feminist non-profit organization dedicated to promoting and protecting the equality rights enshrined in sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*. For more than three decades, LEAF has engaged in litigation, law reform and public education to strengthen and give life to these constitutionally entrenched rights. Throughout a long history of intervening in landmark cases in Canada's courts, LEAF has built a reputation as a leading voice for women's substantive equality in Canada. LEAF has long advocated for religious women's access to justice, and an approach to gender equality rights that respects the right of religious women to practice their religion without jeopardizing other rights guaranteed by Canadian law.

In 2008, LEAF and West Coast LEAF established a Working Group on Women, Religion and Human Rights in the lead-up to the *Polygamy Reference*[7] before the British Columbia Supreme Court. This working group sought to explore feminist understandings of legal and policy issues relating to women, religion, and human rights. The group's work provided a sound basis for LEAF to develop positions in subsequent years concerning women's religious and equality rights.

In 2010, Quebec's Liberal government introduced Bill 94, which would have made it mandatory for persons to have their faces uncovered when receiving or providing any public service. Justifications offered for the Bill included principles of gender equality, state secularism and neutrality. LEAF cautioned against enacting such legislation, which would exacerbate the marginalization and inequality of Muslim women and stigmatize their religious observance.[8]

In 2013, the governing Parti Quebecois proposed Bill 60 (the "*Quebec Charter of Values*"), which would ban religious symbols and limit religious accommodation in Quebec's public service. Once again, this Bill was justified in the name of gender equality, as well as state secularism and neutrality. LEAF voiced its opposition to the Bill out of concern that the government was focusing on stereotypical understandings of women's choice, and on aspects of cultural difference that reduced religious women to essentialized characteristics. LEAF was critical of an approach that regulated women's clothing rather than tackling structural barriers to women's equality, including problems with access to housing, employment, child and elder care, and health services.[9]

7 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

8 See LEAF Submission to the Quebec National Assembly on Bill 94 "An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions (May 7, 2010) online: < http://www.leaf.ca/wp-content/uploads/2016/03/2010-05-Submission-To-The-Quebec-National-Assembly-On-Bill-94.pdf>.

9 See LEAF's statement: The Québec Charter of Values Detracts from the Fight for Women's Equality (October 18, 2013), online: <http://www.leaf.ca/the-quebec-charter-of-values-detracts-from-the-fight-for-womens-equality/>.

In 2012, in *R v NS*, the Supreme Court was asked to determine whether a religiously devout woman sexual assault complainant should be required to remove her niqab when testifying, so that a court could more easily assess her demeanour and by extension, her credibility. The lower courts had dealt with the issue as a matter of weighing the fair trial rights of the accused against NS's freedom of religion. LEAF intervened in the case to argue that NS's equality rights were also at issue. LEAF urged the Court to incorporate s.15 of the *Charter* into its analysis, arguing that a requirement that NS remove her niqab in order to testify at trial would effectively deprive religiously devout women of access to Canadian courts, since it would force them to choose between their religion and their right to report abuse and to participate in the prosecution of their abusers. Unfortunately, the Court ignored the s.15 issue, holding that the extent to which religious practices will be accommodated must be weighed by the trial judge on a case-by-case basis against fair trial rights.[10]

Later in 2015, LEAF sought leave to intervene at the Federal Court of Appeal level in *Ishaq v Minister of Citizenship and Immigration*. The case involved a challenge filed by Zunera Ishaq to the constitutionality of a federal policy requiring all citizenship applicants to take the citizenship oath in public with their faces uncovered. The arguments prepared by LEAF asked the Court to take into account both the equality rights and freedom of religion of religious women. LEAF sought to argue that the federal policy was problematic because: 1) it assumed niqab-wearing women were more likely to commit fraud in taking the citizenship oath; 2) it exacerbated barriers religious women already face in immigration and citizenship processes; and 3) it perpetuated myths and stereotypes of Muslim women as victims of Muslim men and as threats to "Canadian values".[11] Ultimately the case was decided in Ishaq's favour without addressing the constitutional issues.[12]

LEAF has continued to express concern over the persistence of structural barriers to religious women's equality, advocating for the integration of gender equality and freedom of religion in ways that respect and include religious women. As the examples above demonstrate, LEAF advocates for a nuanced understanding of freedom of religion within a context of women's equality. Holding the state accountable to all women, LEAF has asserted that the state has a duty to ensure that women's rights to both equality and religious freedom are fully respected and that these rights are upheld within both private religious institutions and public institutions.

10 See LEAF's intervention in *R v NS*, online: <http://www.leaf.ca/wp-content/uploads/2012/12/NS-SCC.pdf>.

11 See LEAF's intervention application in *Ishaq*, online: < http://www.leaf.ca/wp-content/uploads/2015/06/Motion-Record-LEAF-2.pdf>.

12 None of the six prospective interveners were granted leave to intervene by Stratas JA in *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 151.

Consistent with that approach, this Report reaffirms the importance of a substantive equality analysis, emphasizing the principle of inclusivity and utilizing an intersectional methodological approach to inform the guiding principles going forward. This Report rejects an oppositional construction of women's equality and religious freedom; by contrast, it reasserts the duty of legislatures and courts to protect and enforce women's rights across all communities irrespective of religious affiliation.

PART II. Framing this Report: Guiding Principles

Continued misconceptions about the relationship between freedom of religion and gender equality stem from a conception of state secularism informed by persistent colonial, neo-colonial and Orientalist stereotypes. This report formulates four guiding principles that emerge from an examination of these concepts, and acknowledges the need for an intersectional approach with a focus on substantive equality.

1. A Critique of State Secularism and State Neutrality

A. Religious freedom and the role of the state

Religious freedom is a right guaranteed by section 2 of the *Canadian Charter of Rights and Freedoms*, subject to the limitations on all fundamental rights imposed by section 1 of the *Charter*. In cases such as *Eldridge v British Columbia (Attorney General),*[13]the Court has held that the "duty to accommodate" framework originally developed under human rights codes must be incorporated into *Charter* adjudication as part of the minimal impairment analysis under s. 1.

In recent years, recognizing Canada's growing diversity, the Supreme Court has underscored the centrality of equality, multiculturalism and the reasonable accommodation of difference in responding to minority and religious claimants seeking exemption from mainstream norms.[14] Supreme Court freedom of religion jurisprudence has a long history. *Big M*,[15] which concerned Sunday closing laws, was the first religious freedom case decided by the Supreme Court under the *Charter*. Significantly, the Court invoked s. 27 - multiculturalism - to interpret religious freedom. Subsequent cases such as *Syndicat Northcrest v Amselem*,[16] *Multani v Commission scolaire Marguerite-Bourgeoys*,[17] and *Bruker v Marcovitz*[18] invoked the value of multiculturalism to send a powerful message of equality among all religions under the *Charter*.[19]

B. State Secularism and State Neutrality

Canadian legislative initiatives have relied on particular understandings of secularism, neutrality and equality to justify regulating minority religious groups – in particular, niqab-wearing women.[20] Secularism and state neutrality are related concepts, often used together as a response to claims for the accommodation

13 [1997] 3 SCR 624

14 *See* Richard Moon, 'Liberty, Neutrality, and Inclusion: Religious Freedom Under the *Canadian Charter of Rights and Freedoms*' (2002) 41:3 *Brandeis LJ* 2.

15 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321.

16 *Syndicat Northcrest v Amselem,* 2004 SCC 47, [2004] 2 SCR 551.

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

18 *Bruker, supra* note 3.

19 Vrinda Narain, "Difference and Inclusion: Reframing Reasonable Accommodation" in Richard Albert, Paul Daly, Vanessa McDonnell, eds, *Canada @150: New Frontiers in Constitutional Law*, forthcoming [Narain, "Difference and Inclusion"].

20 Narain, "Difference and Inclusion", *ibid*.

of religious "difference". They are invariably called upon to resist demands for reasonable accommodation in religious equality claims,[21] and to "justify the regulation of minority women...as a universal model of women's freedom."[22] Accordingly, Canadian religious freedom jurisprudence has focused considerable attention on *Charter*-imposed obligations to respect religious freedom.

The meaning of state neutrality in the Canadian context was elaborated upon and reaffirmed in *Mouvement laïque québécois v Saguenay (City)*.[23] In that case, the Court acknowledged that there is a state duty of religious neutrality, but that it is not a separate and distinct *Charter* obligation; instead, it is an aspect of the state's duty to respect freedom of conscience and religion.[24] The Court emphasized that the duty must be interpreted in a manner that promotes diversity and multiculturalism, as well and democratic values.[25] Accordingly, state neutrality does not require strict secularism. As Chief Justice McLachlin observed in *R v NS*:

> A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction. What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The longstanding practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial. The *Canadian Charter of Rights and Freedoms*, which protects both freedom of religion and trial fairness, demands no less.[26]

Canada's courts have reiterated that state neutrality protects the country's multiculturalism, ensuring the equality of Canada's diverse inhabitants.

However, an inflexible understanding of state secularism and religious neutrality continues to manifest itself in legislation such as Bill 62 and the *Zero Tolerance for Barbaric Cultural Practices Act*. Both sought to justify the regulation of religious and racialized minorities in the name of secularism and gender equality. While the state continues to label these bills as measures to promote gender equality, secularism and neutrality, in fact they result in excluding religious minorities from the public sphere and undermining both women's equality and religious freedom.

21 *Ibid*.
22 Susan Moller Okin, "Is Multiculturalism Bad for Women?" *Boston Review* October/November 1997, online: <http://bostonreview.net>.
23 *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3. Ð
24 *Ibid* at para 71
25 *Ibid* at paras 74-5.
26 *R v NS*, *supra* note 4 at para 2 (per McLachlin CJC). See discussion of *R v NS*, Part III.2, below.

2. A Critique of Colonial and Orientalist Stereotypes

A. "Othering" religious women

"Othering" is a term borrowed from philosophy and literary studies to denote a process by which a person, most often representing a group, is held as distinct from the Self. "Othering" is premised on the Self's superiority, its ability to define the Other, and its interest in shoring up the Other as different and inferior. "Othering" has most recently and pertinently been theorized in the context of colonialism and imperialism. In this context, European states have benefited from research and scholarship in the sciences and humanities, among other fields, to assert the racial and cultural inferiority of their colonial subjects and justify domination.

Religious and racialized women are often "Otherized" in contemporary Western societies. This process, which promotes stereotypical perspectives of women as oppressed and without agency, pivots on the essentialization of gender and the homogenization of culture.[27] These narratives, as embodied in case law and legislation, reinforce the understanding of racialized immigrant communities as the "Other" while upholding the majority as the norm. LEAF's symposium, "What is Barbaric?", rejected "Othering" by reaffirming a commitment to substantive equality, intersectionality, inclusivity and challenging norms.

B. The focus on the veil

Across Western states, perhaps no religious symbol has created more controversy than the veil, with all its traditions. Though the veil can be worn in a variety of ways and for a number of "reasons", it remains represented and read as a marker of difference, at the crossroads of Islamophobia in Canada and abroad. As noted by Homa Hoodfar, the veil is seen to represent Muslim women's victimhood and passivity. According to certain secularists and feminists, those that oppose the veil in the public sphere are depicted as progressive and liberal, and as saviours of women endangered by oppressive religious and cultural customs.[28]

These perspectives on veiling are built on the homogenization and reification of "culture" – seeing certain groups as the bearers of an unchanging culture, and viewing dominant or majority norms and cultural practices as the yardstick against which "other" cultural values must be measured.[29] From this perspective, immigrant and religious cultures must be confined to those elements (such as festivals and foods) that enrich Canadian life, and divorced from practices which

27 Vrinda Narain, "Critical Multiculturalism" in Beverley Baines et al, eds, *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012) [Narain, "Critical Multiculturalism"].

28 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. For a detailed discussion on veiling, see also Natasha Bakht, "Veiled Objections: Facing Public Opposition to the Niqab" in Lori Beaman, ed, *Reasonable Accommodation: Managing Religious Diversity* (UBC Press 2012).

29 Sherene H Razack, "The Sharia Law Debate in Ontario: The Modernity/Pre-Modernity Distinction in Legal Efforts to protect Women from Culture" (2007) 15:1 *Fem Legal Studies* 3 at 87.

are constructed as illiberal and uncivilized. In this context emerges a focus on the veil as a practice that the state must regulate or eradicate. Such uncritical perspectives on multiculturalism are singularly focused on what differences the state should accommodate, and the extent to which those differences should be accommodated.[30] It follows that the debate (on multiculturalism and on immigration) is framed around the limits of "our" toleration of some practices, but not others.[31]

Throughout these recurrent controversies over accommodation, debates and understandings of religious attire often fail to take into account religious women's perspectives and experiences. Banning the niqab or other religious clothing from the public sphere, including courts, the civil service, and citizenship ceremonies limits rather than enlarges women's equality rights.[32]

C. Narratives of "saving" and "rescue"

On a global scale, narratives of saving and rescuing women have been used to justify imperialist projects at home and abroad. These narratives are constructed on the perceived inferiority of religious women and their incapacity to liberate themselves from the burdens that non-religious, majority Canadian women have supposedly overcome.[33] It is important to note the colonial roots of these attitudes, and the long history that North American and Western feminisms have shared with imperialist "sisterhood". Sherene Razack argues that the regulation of the conduct of Muslim immigrant communities, justified in the name of gender equality, is linked to culturalist arguments that Muslims are inherently patriarchal and uncivilized.[34] This Orientalist framework resurrects narratives of saving and rescue, informing some Western mainstream feminists' efforts to rescue Muslim women from their outdated, backward, and barbaric laws.[35] Legislative initiatives such as the *Zero Tolerance for Barbaric Cultural Practices Act* become very quickly the focus of neo-colonial attitudes, and familiar narratives of saving and rescue are invoked which disempower Muslim women. [36]

Many liberal feminists like Susan Okin and Martha Nussbaum argue that the affirmation of minority rights by protecting difference and cultural practice jeopardizes women's equality, since they see "traditional" practices as often oppressive to women.[37] Within this liberal framework, as noted by Leti Volpp, culture must be relinquished in the name of assimilation, which alone promises

30 *Ibid* at 84-86.
31 Razack, *supra* note 29 at 86; Narain, "Critical Multiculturalism", *supra* note 27.
32 Narain, "Critical Multiculturalism", *supra* note 27.
33 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).
34 Razack, *supra* note 29.
35 Razack, *supra* note 29 at 6, 16; Vrinda Narain, "Taking 'Culture' Out of Multiculturalism"(2014) 26 *CJWL* 116 at 149 [Narain, "Taking 'Culture' Out"] .
36 Narain, "Difference and Inclusion", *supra* note 19.
37 Martha Minow, "About Women, About Culture: About Them, About Us", in Richard A. Schweder, Martha Minow and Hazel Rose Markus eds, *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York: Russell Sage Foundation, 2002) 252 at 255.

equal rights.[38] As already noted, such a view is based on an essentialization of culture and gender, and is rife with culturalist, neo-colonial and racial undertones and genealogies. It serves to reaffirm stereotypical understandings of racialized women, whereby such women are constructed and re-constructed as oppressed and without agency: an oppressed minority in contrast to women in a liberated, emancipated West. These stereotypes gloss over the continuing and very real challenges confronted by non-minority women in Western countries.[39]

The popular discursive construction of Muslim women as without agency has consequences for intra-community debates, making it more difficult for women to challenge gender inequality within community structures as well as in the general public.[40] Indeed, such a construct underscores the difficulty posed for Muslim women in pursuing a progressive politics, for fear of feeding into the anti-Muslim agenda.[41] These difficulties in turn underscore the need for an intersectional feminist approach.

3. The Need for an Intersectional Approach

The term "intersectionality" was coined over twenty years ago by Kimberlé Crenshaw, bringing together a key set of insights from women-of-color feminism and other critical intellectual traditions. Describing a method of analysis that critiques single-axis conceptions of sexism or racism, the term advances "an understanding of how multiple axes of discrimination reflect the structural, political, and representational realities of racialized women."[42] Intersectionality as a mode of analysis draws attention to the violence of legal and administrative systems that articulate themselves as race and gender neutral, but are lived and experienced as oppressive and unequal.[43] Single-axis analysis – the idea that discrimination happens simply through one system at a time – renders impossible legal analysis that centres on and aims for substantive equality.[44]

Intersectional legal analysis that focuses on substantive and structural equality can inform an understanding of s.15 of the *Charter*, which prohibits discrimination based on women's gender, religion, and sexual identity. Intersectional framing is consistent with the conception of substantive equality for which LEAF has been advocating for many years. LEAF's position on the accommodation of the niqab in courtrooms, the civil service, and citizenship ceremonies has been consistent: women should not have to choose between their cultural practices or religious observance and the exercise of their *Charter* equality rights.[45]

38 Leti Volpp, "Feminism Versus Multiculturalism" (2001) 101:5 *Columbia Law Review* 1181 at 1201.
39 Narain, "Difference and Inclusion", *supra* note 19; Volpp, *supra* note 38.
40 Narain, "Critical Multiculturalism", *supra* note 27 at 47.
41 Razack, *supra* note 29 at 6.
42 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *U Chicago Legal F* 139.
43 Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38:4 *Signs* 1031.
44 Sumi Cho et al, "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis" (2013) 38:4 *Signs* 785 at 787.
45 *Bruker, supra* note 3 at paras 80-82.

4. A Focus on Substantive Equality

A. From a Politics of Cultural Difference to a Focus on Substantive Equality

Reconciling the tension between religious freedom and women's equality requires moving away from a politics of cultural difference to a focus on structural inequality, premised on a notion of substantive equality. 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.[46] Challenging the difference-blind principle, both frameworks argue that public institutions must be required to notice and respond to group difference in order to promote equality.

Justice may sometimes require differential treatment of difference.[47] State policies and initiatives must attend to differences within law, public policy, and social and economic and political institutions rather than ignoring them in the name of formal equality. Iris Marion Young distinguishes between structural difference and cultural difference. Whereas structural differences are born from structural inequality, and mean that some groups are limited in their participation in social and public institutions, cultural differences and inequalities arise when groups or individuals within a group bear significant economic, social, or political costs in trying to maintain or pursue different or distinct life styles or practices.[48]

The politics of cultural difference is concerned with public accommodation to support cultural differences.[49] Cultural difference-based policy-making debates the permissibility of cultural or religious practices, such as wearing the *kirpan* or hijab, or obtaining a *get* or treatment under sharia law. As noted by Narain, "debate on issues such as the headscarf seems to displace structural problems onto issues of culture while ignoring issues of racism, poverty, unemployment, poor education, and access to justice."[50] The shift from a politics of structural difference to a politics of cultural difference is in many ways the work of an uncritical multiculturalism, which obscures structural inequalities to focus instead on cultural differences embodied in minority ethnic and religious groups.[51]

B. Deconstructing the public/private dichotomy

A key feature of intersectional framing is that it recognizes the multiple identities of women and the multiple axes along which women experience discrimination based on the understanding that systems of oppression are interlocking.[52] Indeed the importance of intersectionality is that it disrupts simplistic binaries of public/private, religious/secular, and modern/traditional.[53] These binaries

46 Young, *supra* note 33, at 87; Narain, "Taking 'Culture' Out", *supra* note 35.
47 Young, *ibid* at 62; Narain, *ibid*.
48 Young, *ibid* at 63; Narain, *ibid*.
49 Young, *ibid* at 61; Narain, *ibid*.
50 Young, *ibid* at 83; Narain, *ibid* at 120.
51 Young, *ibid* at 88; Narain, *ibid*.
52 Avtar Brah & Ann Phoenix, "Ain't I A Woman? Revisiting Intersectionality" (2004) 5:3 *J Intl Women's Std* 75 at 77.
53 Vrinda Narain, "The Place of the Niqab in the Courtroom" (2015) 9:1 *ICLJ* 41 at 51 [Narain, "Niqab"].

combine to further exclude some religious women from access to the court system, state-regulated religious arbitrations, public services, or citizenship. This superimposition of the public/private dichotomy onto the religious/secular binary only further marginalizes religious women and further exacerbates their systemic inequality.[54]

5. Guiding Principles

Out of this discussion emerges a set of four general guiding principles which should inform and ground feminist legal work on these issues.

FIRST PRINCIPLE: Substantive Equality
Feminist legal work should be guided by the principle that legal rules must promote rather than undermine the substantive equality of women. This can only be done by assessing the impact of laws in real life contexts, from the perspective of those who inhabit those contexts. Accordingly, the effects of laws must be assessed from the perspectives of the women they may affect, as well as those they purport to serve, and close attention must be paid to how legal rules translate into lived experiences. Recognizing the principle of substantive equality demands that laws take into account both the equality and religious freedom of all women in Canada.

SECOND PRINCIPLE: Intersectionality
Women in Canada experience discrimination along multiple axes, including race, socio-economic status, immigration status, and religious community. Racialised women are at the centre of overlapping systems of subordination. Feminist legal work must be guided by an intersectional analysis that reveals the very specific and particular ways in which women experience discrimination and inequality.[55]

THIRD PRINCIPLE: Inclusivity
Feminist legal work must recognize the importance of including the perspectives of women and groups of women who are often excluded, including racialized women, immigrant women, religiously observant women and sexual minorities within religious groups impacted by the controversies that may arise in tensions between religious practice and state secularism.

FOURTH PRINCIPLE: Challenging Norms
In keeping with a substantive equality analysis, feminist legal work on these issues must be informed by a commitment to challenge state and community norms that reproduce inequality. These include racist, xenophobic, homophobic, and sexist arguments and assumptions, regardless of their source.

54 Narain, "Taking 'Culture' Out", *supra* note 35 at 131.
55 Narain, "Niqab", *supra* note 53.

PART III. Legal Landscape: The Key Case Law

This section of the Report builds on LEAF's religious freedom and equality framework outlined in Part II, using that framework to analyse three important decisions that have defined the judiciary's approach to balancing religious freedom and women's equality. The first case considered is *Bruker v. Marcovitz*,[56] a case brought to the Supreme Court by a religiously-observant Jewish woman seeking damages for breach of a civil contract in which her then-husband promised to give her a *get*, a religious divorce. The second is *R v. NS*,[57] in which NS, a female Muslim sexual assault complainant, sought the right to wear her niqab while giving testimony. The final case is *Ishaq v Canada (Citizenship and Immigration)*,[58] a case brought by Zunera Ishaq, a Muslim woman who insisted on taking the citizenship oath while wearing her niqab.

1. *Bruker v. Marcovitz*

A. Brief Overview

In *Bruker v Marcovitz*, the Supreme Court was required to balance equality and religion in the family law context, where the *Charter* does not directly apply. The case involved a husband who refused to provide his wife with a *get* for 15 years, despite his express promise to do so in a written contract resolving issues surrounding their secular divorce. A *get* is a divorce under Jewish law; while the process takes place before a rabbinical court, a get can only be obtained if the husband agrees to give it. Accordingly, Bruker (the wife) could not be divorced under Jewish law since Marcovitz (the husband) refused to honour his civil commitment to give her a *get*. By the time the case came to the Court, Marcovitz had finally given Bruker a *get*, so by then she was seeking only damages for breach of Marcovitz's contractual undertaking. Marcovitz, argued that the contract was not binding because it infringed on his religious freedom.

There were two key issues raised by this case: 1) whether the agreement to give the *get* was a valid and binding contractual obligation, and 2) whether an award of damages would interfere with Marcovitz's freedom of religion by dictating the terms of his religious observance.[59]

The Court was divided on the outcome. Abella J, writing for the majority, determined that "an agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions, constitutes a valid and binding contractual obligation under Quebec law". In her view, the

56 *Bruker, supra* note 3.
57 *R v NS, supra* note 4.
58 *Ishaq, supra* note 5.
59 *Bruker, supra* note 3 at para 65.

issue at the heart of the dispute was one of contract, regardless of its religious subject matter. In being asked to enforce this contract, "the court was not being asked to endorse or apply a religious norm".[60] On the contrary, it was simply being asked to undertake a function assigned to courts by the *Charter*:

> Mediating these highly personal claims to religious rights with the wider public interest is a task that has been assigned to the courts by legislatures across the country. It is a well-accepted function carried out for decades by human rights commissions under federal and provincial statutes and, for 25 years, by judges under the *Canadian Charter of Rights and Freedoms*, to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion.[61]

In her view, undertaking such a function is consistent with public policy, including "Canada's commitment to eradicating gender discrimination".[62]

Abella J found no evidence that Marcovitz's refusal to provide the *get* was based on religious grounds; on the contrary, his own evidence established secular motivations. Moreover, even if his refusal had had a religious basis, she held that in all the circumstances, and in particular his agreement to provide a *get* in the civil contract with his ex-wife, Marcovitz's claims to religious freedom were outweighed by Canada's "constitutionally and statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce".[63] Abella J emphasized that both Canadian divorce law and Canadian constitutional law are premised on the principle of gender equality, unlike Jewish *get* law which skews the civil balance between men and women enshrined in the *Charter*. In her view, Canadian law must develop to protect religious Jewish women from abuses of this imbalance.[64] Accordingly, she held that:

> [t]he public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests and values that outweigh Mr. Marcovitz's claim that enforcing Paragraph 12 of the Consent would interfere with his religious freedom.[65]

As she saw it, "any infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada."[66] In the result, based on its jurisdiction over domestic contracts, the majority upheld Bruker's claim for damages.

60 *Ibid* at para 20.
61 *Ibid* at para 19.
62 *Ibid* at para 16.
63 *Ibid* at para 80.
64 *Ibid* at para 82.
65 *Ibid* at para 92.
66 *Ibid* at para 94.

Abella J's judgement reflects an understanding that the *Charter* protects both gender equality and multiculturalism. As she put it:

> Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.[67]

Canada's plurality and multiculturalism are therefore defining aspects of Canadian society. However, this understanding is qualified, since the decision acknowledges that Canada still maintains certain values that inherently limit the extent of allowable plurality:

> Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.[68]

By contrast, the strong dissenting judgement of Deschamps and Charron JJ characterized the claims raised by Bruker as purely religious matters, in which the courts may not interfere. The dissenters disagreed with the majority that contractual rights were involved, since they took the view that an agreement relating to proceedings in a religious court did not meet Quebec civil code requirements for the formation of a binding contract.[69] As they saw it, Marcovitz's refusal to give Bruker a *get* had no civil legal consequences; while under Jewish law Bruker had no right to remarry and bear legitimate children, Canadian law did not impose any such consequences on her. Since the religious rules at issue were not a part of Canadian law, they took the view that the involvement of a Canadian court would violate the principle of state neutrality. Accordingly, Bruker's claims were not justiciable.

67 *Ibid* at para 1.
68 *Ibid* at para 2.
69 *Ibid* at paras 174–5.

B. Applying the Framework

FIRST PRINCIPLE: Substantive Equality
Abella J's judgement was guided by a concern for substantive equality. She understood that Bruker's discrimination claims flowed from her contextual position as an observant Jewish woman. Despite her gender-neutral right to divorce under civil law, Abella noted that even if a woman received a civil divorce under Canadian law, the denial of a *get* under Jewish law would render her an *agunah* ("chained wife") in her community.[70] Her inability to obtain a religious divorce placed her in a position of substantive inequality to Markovitz, despite having contracted to the contrary.

By contrast, the dissent in *Bruker* reflects an understanding of state neutrality that places women's lived experiences, and hence their substantive equality, very much in the background.[71] It is one example among many of how courts have used a decontextualized, single-axis concept of state neutrality to impede religious accommodation.

SECOND PRINCIPLE: Intersectionality
Religious women are at the centre of overlapping systems of subordination. Abella J's judgement, rooted in intersectional analysis, reveals the particular ways in which religious women experience discrimination and inequality. Abella J explained that the claimant was one example of many others in society who are simultaneously and equally impacted and governed by Canadian and religious or cultural (in this case Jewish) law.

THIRD PRINCIPLE: Inclusivity
Inclusivity of minority perspectives is necessary in order to complete an intersectional, substantive equality analysis. Abella J assessed the impact of the law and of the consequences for a woman's future of not being granted a religious divorce from the perspective of an observant Jewish women. The dissent foregrounds instead an abstract understanding of contract law. By asserting that the court does not recognize religious contractual objects, the dissenting judges fail to include religious women's perspectives, and to understand the necessity of recognizing their realities within civil institutions.

FOURTH PRINCIPLE: Challenging Norms
Although Abella J's judgement is more inclusive of religious women's perspectives and foregrounds the substantive impact of facially neutral laws on religious women, her judgement does not make theoretical inroads; while it applies inclusive intersectional analysis to achieve substantive equality, it does not expressly challenge the more conventional ways in which courts typically approach issues like this.

70 *Ibid* at paras 3-4.
71 *Ibid* at paras 102, 122-132.

The dissent reinforces mainstream norms that rely on the neutrality concept and do not consider the lived experiences of religious women.

2. *R v. NS*

A. Brief Overview

In *R v NS*, the Supreme Court had to determine whether a complainant in a sexual assault case must remove her niqab in order to testify in a criminal proceeding. The Court identified the following issues:

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

The Court was split on the proper approach to the resolution of these issues. In her majority judgement, Chief Justice McLachlin set out three possible solutions to the problem before the Court:

> One response is to say she must always remove her niqab on the ground that the courtroom is a neutral space where religion has no place. Another response is to say the justice system should respect the witness's freedom of religion and always permit her to testify with the niqab on. In my view, both of these extremes must be rejected in favour of a third option: allowing the witness to testify with her face covered unless this unjustifiably impinges on the accused's fair trial rights.[72]

McLachlin CJ justified her choice of the third option on the ground that the first would privilege secularism over freedom of religion, while the second might "render a trial unfair and lead to wrongful convictions".[73] She noted that ordering a woman to remove her niqab in court could cause her injury by requiring her to depart from the dictates of her faith,[74] and that if religious women associate appearing in court with forsaking their religious observance, it could ultimately impede access to justice for religiously observant women.[75] However, as she saw it, requiring a woman to remove her niqab when testifying could also ensure fairer cross-examinations and assessments of credibility, which could be significant for accused

72 *R v NS*, *supra* note 4 at para 1.
73 *Ibid* at para 2.
74 *Ibid* at para 36.
75 *Ibid* at para 37.

individuals and also promote broader public confidence in the justice system.[76] Ultimately, McLachlin CJ decided on the path of least resistance in which "the witness [would be allowed] to testify with her face covered unless this unjustifiably impinges on the accused's fair trial rights."[77] The determination of whether women could testify wearing a niqab would require a case-by-case assessment by a trial judge in light of the specific factual circumstances of each case. The Court therefore dismissed the appeal, and sent the matter back to the trial judge to be dealt with in light of the Court's ruling. The judgment gives no consideration to the impact of s.15 of the *Charter*.

A concurring judgment authored by LeBel J also dismissed the appeal. However, LeBel J chose the *first* option from the Chief Justice's menu of possible solutions to the problem of competing rights: a rule that a witness should *never* be permitted to testify wearing a niqab. His reasoning has been characterized by a leading scholar as a "clash of civilizations approach" to the accommodation of religious difference and multiculturalism.[78] His opinion is fuelled by a concern for "the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices." LeBel J noted the diversity of contemporary Canadian society, but emphasized that there must be a common foundation premised on core Canadian constitutional values. He argued that multicultural diversity must be measured against what he called "the roots of contemporary democratic society." LeBel J asserted that an independent open justice system is a fundamental aspect of this tradition grounding Canadian democracy. Since the niqab hinders the process of communication inherent in an open trial process, it should not be worn by a witness. In his view, a no-niqab rule is consistent with the tradition that justice is public and open to all in a democratic society. He argued that such a rule should apply at all stages of the criminal trial, including the preliminary inquiry as well as at the trial itself. Like the majority judgement, the LeBel judgment does not take account of s.15 or the equality issues at stake for religious women.

Justice Abella wrote a dissenting judgment in which she chose the *second* of the three options proposed by the Chief Justice: a rule that witnesses like NS could make their own choice about whether to wear a niqab while testifying. She argued that if a witness was forced to remove a niqab that she sincerely believed was required by her religion, it would be like "hanging a sign over the courtroom door saying 'Religious minorities not welcome.'"[79] In her view, such a rule would effectively limit access to justice based on religious belief, and undermine the public perception of fairness in the judicial system.[80] She

76 *Ibid* at para 38.
77 *Ibid* at para 1.
78 Narain, "Niqab", *supra* note 53 at 35.
79 *R v NS*, *supra* note 4 at para 94; Samuel P Huntington, 'The Clash of Civilizations?' *Foreign Affairs* (Summer 1993) 22 online: Harvard Kennedy School of Government <http://www.hks.harvard.edu/fs/pnorris/Acrobat/Huntington_Clash.pdf> accessed 6 February 2015.
80 *R v NS*, *supra* note 4 at para 95.

explained that if witnesses are prevented from acting in accordance with religious requirements they experience as "obligatory and non-optional",[81] this would have "the effect of forcing a witness to choose between her religious beliefs and her ability to participate in the justice system".[82] In the sexual assault context, requiring a woman to remove her niqab as a witness could require a religiously observant Muslim woman to choose between her religion and whether to report an assault.[83] Justice Abella questioned the need for triers of fact to see a witness's face to assess her credibility, noting several examples in which witnesses are permitted under existing legal rules to testify under less than ideal conditions: witnesses who are ill can testify remotely or in writing, and children are permitted to testify via video-conferencing or from behind a screen. The accommodation of niqab-wearing women would be simply one more such reasonable accommodation, and therefore not inconsistent with existing accommodation practice. Accordingly, women such as NS should be permitted to wear a niqab during preliminary proceedings as well as at a subsequent trial.[84]

However, despite the fact that her decision supported NS's position, Justice Abella too made no reference to s.15 of the *Charter*.

B. Applying the Framework

FIRST PRINCIPLE: Substantive Equality

Chief Justice McLachlin's majority judgement reflects the role of the state in managing competing claims and minority rights. Religious freedom and the right to a fair trial are understood simply as competing rights to be balanced in a s.1 analysis. Although the Chief Justice notes the effects on minority women of banning the niqab from the courtroom, these effects are not central to her analysis. What emerges is an ambiguous victory for religious and racialized women who face uncertainty as to their religious rights in the courtroom.

The concurring judgment delivered by LeBel J is concerned with abstract principles and values, and does not engage with the substantive reality and lived experiences of either the claimant or the defendant. The yardstick against which he measures minority beliefs – "core values" – results inevitably in a balance which favours the "norm". Such an approach sends a troubling message to minorities regarding the accommodation of their religious beliefs.[85]

In contrast to both the majority and concurring opinions, Abella J's approach requires courts to be more accommodating of religious observance in the name of inclusion, fairness, and an evolving law that responds to Canada's diverse population. By noting that requiring a religious woman to "choose" between

81 *Ibid* at para 93.
82 *Ibid* at para 94.
83 *Ibid* at para 95.
84 Narain, "Niqab", *supra* note 53 at 35; *R v NS*, *supra* note 4 at para 110.
85 Narain, "Niqab", *supra* note 53 at 35; *R v NS*, *supra* note 4 at para 110.

following her faith and seeking justice in the courts would prevent women from accessing the justice system, Abella J paid attention to the contextual effects for religious women of a rule constructed as neutral. The principle of substantive equality, which requires the Courts to take account of the real effects on women, is premised on such an approach.

SECOND PRINCIPLE: Intersectionality

Intersectionality, as the complement to both inclusivity and substantive equality, requires that courts take into account the systems of discriminations that can operate simultaneously and complementarily to situate minority, religious, and gendered claimants in particularly difficult positions, of which the judicial system is an important example. NS is a veiled Muslim woman claiming sexual assault at the hands of a family member, who then demands that she unveil in order to testify. She faces challenges both as a woman claiming sexual assault within a criminal system notoriously hostile to sexual assault victims, and as a Muslim woman claiming justice against a member of both her community and her family. An understanding of these interacting systems is necessary to craft an adequate and just judicial response.

Crafting such a response is beneficial to all women. While the number of women in Canada who wear a niqab might be low, Natasha Bakht argues that "adequately addressing their plight in this context is just and will ameliorate the workings of the judicial system for all women."[86] This is especially critical in the context of sexual assault, a context that has always been particularly difficult for women to navigate successfully. In essence, an intersectional analysis of NS's situation would hold the promise of expanding the law of sexual assault to comprehend the lived experience of all women.

THIRD PRINCIPLE: Inclusivity

The principle of inclusivity, which rests on an understanding that the perspectives of religious and minority women must be included in legal analyses that aim for equality, is central to Abella J's judgement. Given that the Court is not representative of Canadian citizens in terms of gender, race, or religion, it is imperative that the Court seek to include these perspectives by undertaking substantive equality analyses based on rigorous social science evidence. Abella J's judgment, which challenges the jurisprudential concept of "meaningful choice" by noting the "obligatory and non-optional" nature of much religious observance, is inclusive of religious women's perspectives on the veil.[87]

FOURTH PRINCIPLE: Challenging Norms

The majority judgement privileges majority norms concerning demeanour and credibility, both in terms of a claimant's physical appearance as well as the Court's historical distrust of sexual assault victims. The judgement raises a

86 Bakht, *supra* note 28.
87 *R v NS*, *supra* note 4, at para 93.

number of important criticisms of these norms, but nevertheless regards the role of the court as integrating minority perspectives in mainstream norms, rather than challenging these norms and re-visioning new standards that can enable all claimants to find justice.

The concurring opinion of LeBel J runs directly counter to LEAF's fourth principle. In his judgement, "Canadian values" are seen as static and unchanging; different viewpoints must accommodate *to* them, rather than be accommodated *by* them. Focusing on establishing a clear rule concerning the legality of the niqab in court, LeBel argues that the position that "niqabs may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication. It would also be consistent with the tradition that justice is public and open to all in our democratic society." As Vrinda Narain has observed, "[Lebel J's] concurring opinion's emphasis on 'Canadian values' is worrisome for its rejection of the accommodation of difference. Such a simplistic and uncritical understanding cannot result in a meaningful, purposive, contextual legal response to exclusion and difference."[88]

Abella J's judgement, by contrast, lists several examples in which witnesses can testify under less traditional circumstances, taking into account the lived experience of minority claimants in order to craft an inclusive and rigorous response.

3. *Ishaq v Canada (Citizenship and Immigration)*

A. Brief Overview

In 2011, then-Minister of Citizenship and Immigration Jason Kenney established a policy that required all citizenship applicants to remove any "face coverings" during the public citizenship oath-taking ceremony. If they failed to comply with the policy, they would be unable to take the oath and therefore be denied citizenship. That policy was reflected in a manual for the conduct of citizenship court proceedings.

Zunera Ishaq, a Muslim woman who wears a niqab, filed a Federal Court challenge to the policy. As she explained to the Court:

> My religious beliefs would compel me to refuse to take off my veil in the context of a citizenship oath ceremony, and I firmly believe that based on existing policies, I would therefore be denied Canadian citizenship. I feel that the governmental policy regarding veils at citizenship oath ceremonies is a personal attack on me, my identity as a Muslim woman and my religious beliefs.[89]

88 Narain, "Niqab", *supra* note 53, at 34.
89 *Ishaq, supra* note 5, at para 6.

Citizenship and Immigration Canada had offered to accommodate Ishaq by sitting her next to a woman in the front or back rows of the citizenship ceremony as she said the oath, to minimize the number of participants in the ceremony who would be able to see her without her niqab. However, Ishaq rejected this compromise on the basis that any male citizenship judge and officers would still see her face, and there could be photographers at the ceremony.[90]

Ishaq asked the Court to declare that the policy infringed her s.2(a) and s.15 rights. She argued that she met the legal test for demonstrating that the policy infringed her s.2(a) right,[91] because she held a sincere religious belief that wearing a niqab in public was a religious requirement, and the policy was a non-trivial infringement on that belief, since it required her to "either abandon her religious beliefs or her dream of being a Canadian citizen, for which she had already made significant sacrifices".[92] Concerning her s.15 equality claim, Ishaq argued that while the policy's language may appear to be "neutral" (referring to "face coverings" rather than niqab), it disproportionately affected religious Muslim women and perpetuated the stereotypes and prejudices that had been recognized by the Court in *R v NS*.[93] Concerning s.1 of the *Charter*, Ishaq questioned whether the policy was directed towards a pressing and substantial objective. She argued that citizenship officials did not need to see her mouth move in order to ensure she had taken the oath, since she was already required to sign a written declaration that she took the oath.[94] She argued that the policy had serious deleterious effects on her rights because it would deny her the democratic rights that accompany citizenship as well as the symbolic benefit of citizenship as "a badge identifying [her] as a member of the Canadian polity".[95] She explained that denying her citizenship "so long as she wears the niqab makes her feel worthless and as if she does not belong in the Canadian family".[96]

In addition to these *Charter* arguments, Ishaq also made certain administrative law arguments, claiming that the policy did not conform to the governing legislation, since it imposed a mandatory rule that usurped the statutory/regulatory discretion of citizenship court judges to "administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof".[97]

Ms. Ishaq's challenge was successful before the Federal Court Trial Division. However, the Court decided the case exclusively on the administrative law arguments, holding that the policy was inconsistent with the *Citzenship Act* and

90 *Ibid* at para 8.
91 This test is known as the *Amselem* test [*supra* note 16]; it requires proof both that the religious belief at issue is sincere, and that the challenged law or policy affected the application in more than a trivial way.
92 *Ishaq, supra* note 5 at para 23.
93 *Ibid* at para 24.
94 *Ibid* at para 25.
95 *Ibid* at para 27.
96 *Ibid* at para 27.
97 *Ibid* at para 29.

regulations.[98] Applying well-known principles of judicial restraint, the Court declined to address the constitutional issues, observing that a decision on those issues was unnecessary, and might even be prejudicial to future cases.[99] On appeal, the Federal Court of Appeal adopted the same approach. Like the Trial Division, it decided the case on narrow administrative law grounds, holding that the *Citizenship Act* did not permit the government to impose mandatory rules like this except through regulation. While the Harper government launched a further appeal to the Supreme Court of Canada, that appeal was withdrawn by the new government after the 2015 election.

As a result, no court actually addressed the *Charter* arguments put forward by Ms. Ishaq.

B. Applying the Framework

As in *R v NS*, *Ishaq* concerns the right of a Muslim woman to wear a niqab in the spaces of the state – the courtroom and the citizenship ceremony. LEAF's framework analysis on the question of whether Zunera Ishaq has a right to wear the niqab to take the oath of citizenship is similar to that outlined for the *R v NS* case on its four axes: substantive equality, intersectionality, inclusivity, and challenging norms. Consistent with its arguments in its *NS* intervention, LEAF would argue that under s.15 of the *Charter*, religious women should not have to forfeit religious observance protected by s.2(a) in order to be afforded substantive equality. Both constitutional rights – equality and freedom of religion – jointly ensure that religious women must be permitted to practice their religion under conditions which also respect their other social and democratic rights.

Although the legal contexts in *NS* and *Ishaq* differ, LEAF's position on women's right to choose and the accommodation of religious difference remains consistent.

FIRST PRINCIPLE: Substantive Equality

In *R v Ishaq*, the court chose to decide the case on administrative principles, following a tradition of judicial restraint with minimal impact on legislative or executive powers.[100] Accordingly, there is no discussion of the constitutional issues. The decision nevertheless looked at the practical effect of the citizenship oath policy on a number of potential applicants: "Any requirement that a candidate for citizenship actually be seen taking the oath would make it impossible not just for a niqab-wearing woman to obtain citizenship, but also for a mute person or a silent monk."[101] The judgement also contextualized the policy by looking at the Minister's statements, and recognized the discriminatory practical effect on Muslim women of a law that appeared to have a neutral

98 *Ibid* at para 59.
99 *Ibid* at para 66.
100 *Ibid* at para 66.
101 *Ibid* at para 61.

application, forbidding face-coverings of every sort rather than specifically outlawing religious symbols.

SECOND PRINCIPLE: Intersectionality

Intersectionality, in this case, focuses on understanding the precarity of the claimant's position. As a permanent resident asking for citizenship, Ishaq faced challenges relating to immigration status, as well as relating to discrimination because of her religious affiliation, gender, and racialization. While these issues are not directly addressed by the court, its ruling in Ishaq's favour and its insistence that its order be processed in time for her to take her citizenship oath prior to the upcoming federal election, took account of the precarity of her location.

THIRD PRINCIPLE: Inclusivity

The judgement rests on the finding that there is a contradiction between the regulations and the Minister's policy because that policy fetters judges' discretion. This finding of a contradiction rests on the judge's affirmation of freedom of religion as well as the recognition of the non-voluntary nature of the niqab to the women who wear it. The judge notes:

> Citizenship judges cannot exercise that function to determine what degree of freedom is possible if they instead obey the Policy's directive to ensure that candidates for citizenship have been seen, face uncovered, taking the oath. How can a citizenship judge afford the greatest possible freedom in respect of the religious solemnization or solemn affirmation in taking the oath if the Policy requires candidates to violate or renounce a basic tenet of their religion?[102]

The judgement assumes that wearing a niqab is a basic tenet of Zunera Ishaq's religion as she has claimed; it is not a garment that can be taken off when convenient. This reflects a perception that is highly inclusive of women of faith.

FOURTH PRINCIPLE: Challenging Norms

As noted above, the decision rested on narrow administrative grounds and avoided making any determinations about any infringement of Ms. Ishaq's *Charter* rights.

102 *Ibid* at para 54.

PART IV. Legislative Landscape

1. *Bill 60: The Quebec Charter of Values*

A. Brief Overview

Successive governments in Quebec have sought to set legislative limits on reasonable accommodation, particularly with regard to the religious clothing of women. The state has demonstrated its focus on racialized minority women in two successive bills: Bill 94 and Bill 60, also called the *Quebec Charter of Values*. The proposed charter illustrates an approach to accommodating equality and religion based on state secularism, state neutrality and a concept of gender equality which justifies a focus on regulating minority women.

The first of these bills, Bill 94, was introduced in Quebec in 2010. The proposed bill defined the extent of reasonable religious accommodations and sought to prohibit women from covering their faces while providing or receiving government services.[103] The Bill had wide breadth, applying to all government departments and agencies, all government-funded bodies, and public service employees, among others.[104] The Bill did not pass in the National Assembly.

In 2013, the governing Parti Québecois (PQ) tried to introduce similar legislation: Bill 60, the *Quebec Charter of Values*. This bill required that individuals employed by public bodies "must maintain religious neutrality"[105] and "exercise reserve with regard to expressing religious beliefs".[106] It prevented all public personnel from wearing any religious symbols,[107] or having their face covered when providing public services.[108] The Bill was not passed before the PQ were voted out of office. Bill 62, a narrower version of Bill 94, has been introduced at the National Assembly and adopted in principle, but it has not yet been passed into law.[109]

Feminists in Quebec, as well as the Quebec government's *Conseil du statut de la femme* (Council for the Status of Women), were divided in their response to these bills. The *Conseil*'s leader at the time, Julie Miville-Dechêne was hesitant to take a position on the bill before its potential impacts on women could be studied in more detail. The *Conseil*'s previous leader, Christiane Pelchat, favoured Bill 60, believing secularism to be more supportive of women's rights than any religion. When the independent *Fédération des femmes du Québec* (Quebec Federation of Women) publicly spoke out against the *Quebec Charter of Values*,

103 Bill 94, *An Act to Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions*, National Assembly, 1st Sess, 39th Leg, 2010, cl 1 and 6.
104 *Ibid* at s 2
105 *Quebec Charter of Values, supra* note 6 at cl 3.
106 *Ibid,* cl 4.
107 *Ibid,* cl 5.
108 *Ibid,* cl 6-7, 9.
109 For the bill's current status, see online: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-62-41-1.html>.

former Supreme Court Justice Claire L'Heureux-Dubé and former *Parti Québécois* Minister Louise Beaudoin formed a pro-*Charter* group.[110] Like others in Quebec who supported the province's struggle for independence from the Catholic church in the 1960s, many Quebec feminists argued that gender equality was more easily won without religion.

A number of civil society organizations spoke out against Bill 60. Much of the public debate concerning women in niqabs was characterized by mistrust and "othering" of Muslim women, and much of the pro-Bill 60 discourse reflected Islamophobic and racist tendencies. Addressing Bill 60, the National Council of Canadian Muslims (NCCM) asserted, "the only proper and practical perspective to understand hijab and niqab is that of the women who choose to wear it today in Quebec. They are most knowledgeable of their own practices and they are most affected by the proposed legislation".[111] This sentiment was echoed by the Canadian Council of Muslim Women (CCMW), who argued that accommodation policies were sufficient to address niqabs in the public service and that the bill was unnecessary:

> We acknowledge that it is reasonable to expect an individual to show the face for identification, health, safety and security purposes when accessing services. This can be accomplished by a well thought-out accommodation policy. There is no need for legislation or regulation.[112]

The CCMW's report explained, "the niqab has often been problematized as a symbol of Islamic extremism, women's oppression and lastly, the failure of Muslims to integrate".[113] Noting the lack of women's voices in public debates concerning the issue, the report "is first and foremost about the *lived* experiences of the women and the diverse narratives that they have shared".[114]

In response to Bill 60, the NCCM recommended that more effort be made to integrate and include religious minorities, rather than banning all signs of their difference in Quebec. The NCCM suggested that the objectives of state religious and gender equality could be achieved in other ways that would prevent the negative consequences of the Bill. Their recommendations sought to integrate state neutrality and individuals' religious rights, ensuring that religious accommodation would persist, but in a measured way:

110 Lysiane Gagnon, "In Quebec, a feminist rift over secularism", *The Globe and Mail*, October 2, 2013, online:http://www.theglobeandmail.com/globe-debate/in-quebec-a-feminist-rift-over-secularism/article14639735/.

111 National Council of Canadian Muslims, *Brief Concerning Bill 60: Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality Between Women and Men, and Providing a Framework for Accommodation* (December 20, 2013) online: <REQUESTS<http://www.nccm.ca/wp-content/uploads/2014/03/NCCM-Submission-on-Bill-60-to-Quebec-NA.pdf> at para 19 [NCCM].

112 *Ibid*.

113 Lynda Clarke, "Women in Niqab Speak: A study of the niqab in Canada" prepared for the Canadian Council of Muslim Women, (2013) report prepared for the Canadian Council of Muslim Women; online: <http://ccmw.com/women-in-niqab-speak-a-study-of-the-niqab-in-canada/> at iii.

114 *Ibid* at iii.

1. Require public employees or officials to take an oath or solemn declaration of neutrality, rather than preventing them from wearing religious symbols;
2. Limit the instances in which individuals must uncover their faces to receive public services (for example, only having to uncover one's face to prove identity);
3. Accommodate religiously motivated dietary restrictions in childcare settings – which should not be seen as constituting "prohibited religious instruction"; and
4. Remove the requirement to deny religious accommodation requests that are seen to compromise state secularism.[115]

In keeping with its stance in the *NS* and *Ishaq* cases discussed in the sections above, LEAF has consistently criticized the approach to equality taken by the Quebec government in Bills 94 and 60. Contrary to the government's insistence that gender equality is best promoted through enforced secularization, LEAF continues to advocate for religious women's right to both equality and religious observance.

B. Applying the Framework

FIRST PRINCIPLE: Substantive Equality

The *Charter of Values* was presented by supporters as a way to bring equality to men and women by banning and discouraging certain visible religious practices such as veiling. While the government rhetoric concerning both Bills 94 and 60 made a clear connection between forced secularization and greater gender equality, the NCCM argued that in practice the bills could aggravate already existing inequality by making it harder for religious women to access public services, further marginalizing an already excluded demographic and increasing religious women's dependency rather than their empowerment.[116] Indeed, substantive equality requires an analysis of the practical impact of legislation on women's lived experience. While Bill 60 was neutral on its face, banning all religious symbols, its only substantive effect was on Muslim women. As such, banning religious symbols would place religious women at a disadvantage, forcing them to choose between their religious beliefs and their social and civil rights and entitlements. The NCCM's stance is consistent with *Charter* jurisprudence that protects women's substantive equality without requiring them to forsake their religious observance.

115 NCCM, *supra* note 111, at 52.
116 *Ibid*.

Fears that bills such as the *Charter of Values* would aggravate rather than ameliorate women's equality were confirmed in 2013, when several instances of Muslim women being harassed in public surfaced in the media soon after the introduction of Bill 60.[117] Even without it being passed, reactions to the Bill demonstrated how it could fail to promote gender equality.

SECOND PRINCIPLE: Intersectionality
This Bill, and the debate that ensued, affected some of the most marginalized persons in Canada: racialized women in religious communities. The Bill was poised to have a serious effect on Muslim women's access to public services. It brought to the fore the role of the state in balancing religious freedom and state neutrality, but it also awakened debates within the feminist community relating to intersectionality, and particularly the need for an intersectional feminist approach to legislation.

THIRD PRINCIPLE: Inclusivity
The voices of religiously-observant Muslim women were not included in the debates surrounding the *Charter of Values.* The NCCM has repeatedly called for the inclusion of Muslim women's voices in debates surrounding veiling practices and the niqab. Without these voices, legislation cannot be inclusive and is unlikely to lead to substantive equality.

FOURTH PRINCIPLE: Challenging Norms
Rather than challenging norms, Bill 60 reinforces stereotypical notions of religious communities, portraying Muslim women as oppressed and voiceless. It is premised on particular understandings of gender equality, identity and group interests that reflect mainstream norms, and serves paradoxically to move minority women further away from substantive equality and democratic inclusion.

2. Zero Tolerance for Barbaric Cultural Practices Act

A. Brief Overview

In 2015, the federal government passed a statute amending three main pieces of legislation: the *Immigration and Refugee Protection Act (IRPA)*, the *Civil Marriage Act* and the *Criminal Code.* The statute was given the following "short title": *Zero Tolerance for Barbaric Cultural Practices Act*.[118] It targeted polygamy, underage marriage and forced marriage, as well as so-called "honour" killings.

Given that all targeted practices were already illegal under less culturally-specific headings, this statute was criticized as introducing unnecessary criminal laws

117 See Benjamin Shingler & Melanie Marquis, "Woman says she was accosted in mall over her Islamic veil as Liberals threaten election over Quebec Charter", *National Post* (September 26, 2013); online: <http://news.nationalpost.com/news/canada/woman-says-she-was-accosted-in-mall-over-her-islamic-veil-as-liberals-threaten-election-over-quebec-charter>.

118 *Supra*, note 2. The much less controversial "long title" of this statute is *An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts*. However, it is the "short title" of a statute that is intended to be used in practice.

that unfairly target racialized communities as importers of violence against women. The Canadian Bar Association has argued that the legal value of the Act is questionable, and that the need for many of its provisions is unclear, suggesting that its value lies in its rhetorical message,[119] clearly conveyed by the short title of the statute. The CBA contends that the Act's short title is "divisive and misleading, and oversimplifies the factors that contribute to discrimination and violence against women and children".[120]

The first part of the statute concerns changes to Canadian immigration law. It amends the *Immigration and Refugee Protection Act* to specify that permanent residents or foreign nationals could be found inadmissible (i.e. would not be granted permanent residency or citizenship) on the grounds that they practiced or would practice polygamy in Canada.

The second part creates new marriage consent requirements and asks the provinces to require judicial approval for any marriage where the parties are between 16 and 18 years old; previously, parental consent had been sufficient. The Act further criminalizes celebrating, aiding or participating in forced or underage marriage. It extends the use of peace bonds, so that they can be obtained against those celebrating, aiding or participating in forced or underage marriage.

The third part directly concerns Canadian criminal law. It creates new offences for inclusion in the *Criminal Code*, and changes the law governing the defence of provocation to prohibit its use as a defence to charges of so-called "honour" killing. [121]

B. Applying the Framework

FIRST PRINCIPLE: Substantive Equality

Substantive equality entails paying close attention to how legal rules may translate into lived experiences. A number of important critiques have been levelled at this Act for failing to understand the dynamics of community and conjugal violence, and for crafting laws that may exacerbate the violence and vulnerability faced by racialized, immigrant women. For example, the Act's amendments to immigration law for polygamy will result in further isolating immigrant women. They will be deterred from seeking help by more tightly tying their immigration status to that of their spouses. This means that women in polygamous relationships would be deterred from seeking help if they wish to do so, due to an increased risk of their own deportation as well as that of their children.[122]

119 Canadian Bar Association, Criminal Justice and Immigration Law Sections, Children's Law Committee and Sexual Orientation and Gender Identity Conference, "Bill S-7: *Zero Tolerance for Barbaric Cultural Practices Act*", April 2015 (online: http://www.cba.org/CBA/submissions/pdf/15-25-eng.pdf).

120 *Ibid.*

121 *BCPA*, *supra* note 2.

122 METRAC Action on Violence, *Statement on Bill S-7 Regarding the Effects on Vulnerable Women and Girls of the New Amendments under Bill S-7: The Zero Tolerance for Barbaric Cultural Practices Act*, online: <http://owjn.org/owjn_2009/images/pdfs/Statement-on-Bill%20S-7-Zero-Tolerance-for- Barbaric-Cultural-Practices-Act.pdf>.

Amendments to the *Criminal Code*, such as that criminalizing celebrating, aiding or participating in forced or underage marriage may further isolate affected women by creating incentives for silence and secrecy among community members. It is inconsistent with United Nations best practices on the prevention of forced and underage marriage.[123] The Act's use of criminal law to address the issue of forced marriages similarly stigmatizes the practice, encouraging its proponents to become more skilled in hiding their attempts to coerce marriages, and forcing victims to go "deeper underground", rather than seek support.[124] The Act sets the minimum age for marriage at 16 years, lower than statutes in every province and territory other than Quebec, adding a requirement of "free and enlightened consent".

SECOND PRINCIPLE: Intersectionality

This Act profoundly impacts some of the most marginalized groups in Canada: racialized immigrant women in religious communities. By the changes it effects to the *Criminal Code* and the *IRPA*, this Act may effectively force immigrant, racialized and religious women who are in difficult situations to choose between their well-being and that of their communities, which may be particularly impacted by the Act's amendments concerning the criminalization of celebrating, aiding or participating in forced or underage marriage. An intersectional legislative approach must recognize the intersectional interests of women who may be in difficult positions vis à vis their communities, families, and the state, in order to ease the burdens, fears and vulnerabilities of women in abusive or unwanted relationships. New criminal offences for family and community members who know of or witness forced or underage marriage will likely deter women and girls from seeking help, and will have the perverse effect of creating additional "institutional barriers to marginalized communities reporting violence and having access to support".[125]

THIRD PRINCIPLE: Inclusivity

The critiques provided by community organizations highlight how important it is for diverse women to be adequately consulted in legal reform, especially when such reform is being undertaken in their name. While the federal government asserted that the purpose of this Act was to address the needs of and protect vulnerable women, legal practitioners and community organizations provided compelling arguments that these measures would only further isolate, stigmatize, and marginalize women. The former federal government's Islamophobic and xenophobic rhetoric, focused on "culture" as the root of violence against women, misinformed the public, perpetuating harmful myths about newcomer women and insinuating that newcomers import barbaric

123 *Ibid*.

124 *Ibid*.

125 *Ibid*; see also Shannon Giannitsopoulou, Barbra Schlifer Commemorative Clinic: "If passed, the 'Zero Tolerance for Barbaric Cultural Practices Act' Will Pose Another Instrumental Barrier to Marginalized Communities Reporting Violence and Receiving Support", online: <http://schliferclinic.com/if-passed-the-zero -tolerance-for-barbaric-cultural-practices-act-will-pose-another-institutional-barrier-to-marginalized-communities-reporting-violence-and-receiving-support/>.

practices into Canada,[126] despite the fact that women from all backgrounds face elevated levels of violence in Canada, especially Indigenous women.[127] The Act's extension of the criminal law could become another excuse for law enforcement to further profile and harass members of racialized and newcomer communities in the name of racialized women.[128]

C. Challenging Norms

This statute rehearses colonial tropes of saving and rescue for Muslim women that must be challenged in order to re-vision equality for women in Canada. By not taking the needs of women into account and further threatening their wellbeing, the Act discriminates against women, reinforcing their marginalization and disadvantage, and thus infringing rather than promoting their s.15 rights.

Various concrete suggestions were made to address issues raised by this statute. The Canadian Bar Association recommended consultations with key stakeholders who could help to ensure that changes were beneficial and in keeping with the Canadian criminal law system.[129] The South Asian Legal Clinic of Ontario observed that the federal government's support of front-line services for women would be more effective assistance for women resisting or leaving forced marriages.[130]

126 *Ibid*.

127 See generally: Legal Strategies Coalition on Violence Against Indigenous Women (LSC), online: <leaf.ca/legal/legal-strategy-coalition-on-violence-against-indigenous-women-lsc/>.

128 METRAC, *supra* note 122.

129 Canadian Bar Association, *supra* note 119, at 7-8.

130 South Asian Legal Clinic of Ontario, *"Perpetuating Myths, Denying Justice: "Zero Tolerance for Barbaric Cultural Practices Act"*, accessed online: <http://www.salc.on.ca/FINALBILLS7STATEMENT %20updated%20nov%2018.pdf> at 4.

Conclusion

This Report reflects the current state of LEAF's thinking on the role of law and legal institutions in balancing women's equality and religious freedom. Its framework, derived from interdisciplinary scholarship, critical race and feminist theory and constitutional law, can guide LEAF's future work on these issues.

The framework has four guiding principles. The first principle is substantive equality, the principle that legal rules must promote rather than undermine the substantive equality of women. Substantive equality can be best achieved here by foregrounding the actual effect of laws and their application on the lived experiences of women, taking into account religious freedom and religious, cultural or communal practice. The second principle is intersectionality – the recognition that multiple axes of discrimination require multiple axes of analysis, including race, socio-economic status, immigration status, and religious community. The third principle is inclusivity – the recognition that the perspectives of marginalized groups, such as religious and immigrant women, must be included in legislative projects and adjudication. The fourth and last principle is the commitment to challenging norms so as to ensure that the assumptions and logics of legal, social, and economic analysis aim to promote equality.

Together, these four principles form a framework which animates this report. In Part III, this framework was applied to three cases, *Bruker v. Marcovitz*, *R v. NS,* and *Ishaq v. Canada*. That analysis reveals a judiciary moving towards inclusivity and substantive equality, but struggling with intersectional analysis and with challenging mainstream norms. In Part IV, the LEAF framework formed the basis for analysing two legislative projects, the *Quebec Charter of Values* and the *Zero Tolerance for Barbaric Cultural Practices Act*. Both these projects relied on stereotypical depictions of religious groups to further exclude marginalized groups, such as religious and immigrant women, which already face systemic inequality.

The *Canadian Charter of Rights and Freedoms* grounds the framework for reconciling, accommodating, and if necessary, balancing rights. As this Report illustrates, the interpretation of rights within this framework continues to evolve over time to meet new claims. *Charter* jurisprudence has established that while no rights are absolute, there is also no hierarchy of rights. Rather, rights must be interpreted and applied in a purposeful and contextual way that promotes substantive equality. Applying LEAF's four guiding principles – substantive equality, intersectionality, inclusivity and challenging norms – will bring us closer to genuine and meaningful reconciliation of gender equality with religious freedom.

Appendix 1

LEAF Women, Equality and Religious Rights Community Event and Symposium Participants

Community Event

Thursday, January 29, 2015
United Steelworkers Hall, 25 Cecil St, Toronto, ON, M5T 1N1
5:30pm-7:30pm

PANEL PARTICIPANT	POSITION	AFFILIATION(S)
Dawnis Kennedy	Anishinabe law scholar	
Shareen Gokal	Manager, Resisting and Challenging Religious Fundamentalisms Program	Association for Women's Rights in Development (AWID)
Alia Hogben	Executive Director	Canadian Council of Muslim Women (CCMW)
Farrah Khan	Counsellor	Barbra Schlifer Clinic
Moderator		
Sonia Lawrence	Associate Professor	Osgoode Hall Law School

Symposium

Friday, January 30,
United Steelworkers Hall, 25 Cecil St, Toronto, ON, M5T 1N1
8:30am-5:00pm

Panel #1 Access to Public Services/Education

PARTICIPANT	POSITION	AFFILIATION(S)
Fathima Cader	Lecturer	University of Windsor/Canadian Association of Muslim Women Lawyers
Bochra Manaï	PhD candidate, Urban Studies	INRS-UCS(Centre Urbanisation Culture Société de l'Institut national de la recherche scientifique (INRS))
Amy Casipullai	Senior Coordinator of Policy	Ontario Council of Agencies Serving Immigrants (OCASI)
Moderator		
Janina Fogel	Law Program Committee Member	LEAF/ FAEJ

Panel #2 Family Law

PARTICIPANT	POSITION	AFFILIATION
Deepa Mattoo	Acting Executive Director	South Asian Legal Clinic Ontario
Angela Campbell	Associate Professor, Associate Dean (Graduate Studies)	Faculty of Law, McGill University
Natasha Bakht	Associate Professor	Faculty of Law, University of Ottawa
Moderator		
Renée Cochard	Board and Law Program Committee Member	LEAF/ FAEJ

Panel #3 Constitutional Law

PARTICIPANT	POSITION	AFFILIATION
Benjamin L. Berger	Associate Professor	Osgoode Hall Law School
Cara Faith Zwibel	Director, Fundamental Freedoms Program	Canadian Civil Liberties Association
Beverley Baines	Professor	Faculty of Law, Queen's University
Vrinda Narain	Assistant Professor	McGill University
Moderator		
Julie Lassonde	Law Program Committee	LEAF/ FAEJ

Panel #4 Legal Strategies for LEAF Moving Forward

Discussant	Position	Affiliation
Reema Khawja (Panel #1 Access to Public Services/ Education)	Legal Counsel	Ontario Human Rights Commission
Bruce Ryder (Panel #3 Constitutional Law)	Professor	Osgoode Hall Law School, York University
Angela Chaisson (TWU)	Associate	Ruby Shiller Chan Hasan Barristers
Archana Medhakar	Lawyer	Archana Medhekar Law
Moderator		
Kim Stanton	Legal Director	LEAF/FAEJ