

The Intersection of Race and Gender in the Matter of the Canadian State’s Ban on Facial Coverings During the Course of Citizenship Oaths.

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I

On December 12, 2011, the Canadian Minister of Citizenship, Immigration and Multiculturalism (the “Minister”) released Operational Bulletin 359² (the “Bulletin”) which provides “guidance to Citizenship and Immigration Canada (CIC) staff and to ensure that candidates are seen taking the Oath of Citizenship at a ceremony and on the procedures to be followed for candidates wearing full or partial face coverings.” The government has indicated that the primary intended effect of the Bulletin is to prevent women from giving the oath of citizenship while wearing a niqab or other religious face-covering.

II

The Bulletin is the source of the new rule regarding the procedure for swearing an oath of citizenship. It is not uncommon for the Minister to issue operational bulletins in circumstances where an existing policy is ambiguous or unclear. In this vein, it is important to note that such bulletins are statements providing the Minister’s direction on how to implement and interpret various statutes for which the Minister has responsibility, including the Citizenship Act and the Citizenship Regulations. As such, they are policy, not law; any interpretive guidance or instruction contained in them are not dispositive and therefore it is unlikely that they will be directly subject to scrutiny under the Canadian Charter of Rights and Freedoms.

III

Accordingly, we do not believe that the Bulletin can itself be directly challenged as contrary to the Charter. However, it could be challenged in scenarios such as: (a) an individual applicant for citizenship is denied such citizenship based only on her

¹ The Barbra Schlifer Clinic offers legal representation, professional counselling and multilingual interpretation to over 4,000 women who have experienced violence, each year in Toronto. Over 70% are women of colour and new immigrant women. The Clinic had intervener status in the recent Supreme Court of Canada Case, N.S. v. R. (SCC). It was established in 1985.

² <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob359.asp>.

refusal to remove her niqab or burqa while swearing the oath of citizenship; or (b) an individual seeks an exemption from the requirement to remove her niqab or burqa while swearing the oath and is denied such exemption by the Minister. These kinds of circumstances may give rise to a Charter-based or administrative-law based legal challenge from within Canada.

IV

The lack of clear avenue for domestic challenge, as well as the explicitly racialized dimensions of the focus on the visible identity of Muslim women in Canadian society, marks this as a matter for consideration by CERD under the regular reporting cycle. Thus, we appeal to the advanced intersectional approach CERD has articulated regarding the overlap between religion and ethnicity (A/60/18, paragraph 246 (Georgia); A58/18 paragraph 540 (United Kingdom); A61/18, paragraph 418, Ukraine), as well as gender and race (GC 25, A/55/18, Annex V.A) in order to bring the matter to CERD's attention.

V

Accurate statistics for the position of Muslim women in Canadian society are just beginning to emerge, and their profile vis-à-vis other 'minority populations' displays all the markers of racialized identity, subject to racial stereotyping, limitation on social advancement, subjected to bigotry and (administrative) discrimination.³ The Canadian Council of Muslim Women published their 2009 research report, *Engaging Muslim Women: Issues and Needs*, based on a national needs assessment of Muslim women across Canada, including the results of an extensive survey and focus groups held with Muslim women in major cities across the country. According to the report, Muslim women tend to be disengaged from the civic and political life of the country. They are also more likely to be absent from the labour market and tend to be more socially engaged within Muslim communities and less so in broader Canadian society. Social isolation is a particular hallmark of this population.⁴ From among Muslim women, those wearing the niqab (full facial veil revealing only the eyes) form an additional minority. As a tiny percentage of an already acknowledged minority, we query the proportionality of state focus on this group. We are here to express our concern that such public scrutiny and disproportionate public policy intervention, seeking to further limit this group's

³ In Canada, Muslims make up 2% of the Canadian population and just under 50% of that population is women. Muslim women are isolated socially, culturally, and economically. Approximately, 85% of Muslim women in Canada belong to marginalized communities; 40% are from West Asia, followed by 35% being from the Middle East and North Africa (CCMW, 2004:2).

⁴ Fewer than 50% of Muslim women, who are able to work, participate in the labour market. Unemployment rates among Muslim women are 16.5%, which is in contrast to the 7.2% of all unemployed women in Canada. Additionally, approximately 1% of the Muslim Canadian female population work for family businesses and receive no pay for their work (CCMW, 2004:3). See also, Daood Hamdani', *Engaging Muslim Women, Issues and Trends; Muslim Women: Beyond the Perceptions; Triple Jeopardy: Muslim Women's Experience of Discrimination; and Muslim Women's Civic Participation: From Polling Booths to Parliament* (Canadian Council of Muslim Women, http://www.ccmw.com/resources/res_Publications.html (Accessed February 12, 2012, 2:48 pm, EST).

already marginal engagement with mainstream institutions, in fact tips Canada, in this regard, into incitement to discrimination.

VI

In his announcement of the citizenship oath ban on niqabs-wearing women, the Minister invoked the equality rights of women as a grounds for the move, saying

[the veil] reflects a certain view about women that we don't accept in Canada. We want women to be full and equal members of Canadian society and certainly when they're taking the citizenship oath, that's the right place to start. (Toronto Star, <http://www.thestar.com/opinion/editorials/article/1100856--citizenship-and-bigotry>).

We contend that this invocation of women's rights misunderstands the intersectional nature of discrimination.

We note, with CERD, that :

racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life (CERD, General Recommendation 25, A1. <http://www.unhcr.ch/tbs/doc.nsf/0/76a293e49a88bd23802568bd00538d83?Opendocument>).

VII

We find the ban on the niqab during the taking of the citizenship oath an instance where racial discrimination primarily affects women, as women are by definition the only members of the community to wear the niqab. We note with concern the very circumstances that CERD has anticipated in its exploration of the gender dimensions of racial discrimination in the case of women who wear niqab in Canada, both in this instance, and more generally. Specifically, the prohibition on their expression creates increased isolation and exclusion of observant Muslim women who wear their cultural/ethnic/religious identity so openly. It constitutes a de facto circumstance of reduced access to justice and legal remedy. As CERD has observed:

Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life (GC 25, A2).

VIII

The Minister's announcement came as the Supreme Court of Canada considers a case of a sexual assault complainant who has appealed an order requiring her to remove the niqab at the preliminary hearing of the criminal case against the relatives who are her alleged assailants. It also comes on the heels of a protracted effort on the part of the Quebec Legislative Assembly to ban niqab-wearing women from all public services, in its ill-defined Bill 94. The latter government Bill also invoked women's rights as a pretext for denying niqab-wearing women access to essential government services, public employment, educational opportunities, and health care.

IX

We urge CERD to interrogate the coercion implicit in these moves to require women to fit into the "mainstream," whatever that may be in our pluralistic society, by withholding citizenship, along with the right to vote, run for public office and hold some jobs. Is the citizenship ceremony the place to demand that newcomers give up deeply held religious or cultural practices that are perfectly legal and don't infringe on the rights of others? Does it not expressly require newcomers to behave and look just like an implicitly racialized (white, culturally European in descent) 'us', or pay the price by becoming a permanent 'them', thereby establishing a hierarchy of rights based on nothing other than descent, ethnic origin, 'impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms'? (CERD, Art. 1).

X

What "matter of deep principle" is the Canadian state affirming through this measure? And how does it square with Canada's vaunted image as an open, tolerant, welcoming society? Indeed, how does denying otherwise qualified people citizenship without benefit of a debate in Parliament and the appropriate legislation, square with Canada's obligations under CERD, which include the protection of non-citizens (CERD, General Recommendation 30 (2004)). The state legitimately expects newcomers to join Canadian society by learning to speak English or French, by grasping something of its history and to respect its laws. But we query the demand that they bow to mainstream cultural preferences. Where could this leave any minority should it remain a new and unchallenged Canadian norm?

XI

We recommend in this regard that Canada be required to apply a reasonable standard or test in its justification to CERD of the citizenship ban, which we posit as a harbinger of a constrained and bigoted –and ultimately racist-- definition of pluralism, multiculturalism and women's equality. This test has a variety of essentially similar forms in national, regional and international law. Canada's own

Oakes test, emergent out of constitutional law under its Charter of Rights and Freedoms, is one such standard that could be applied:

- (a) Does the state action have a pressing and substantial objective?;
- (b) Are the measures adopted rationally connected to the objective?;
- (c) Does the state action minimally impair the rights in question?; and
- (d) Is there proportionality between the state action's salutary and deleterious effects? ⁵

XII

We recommend that Canada be required to demonstrate its compliance with Article 2 obligations in this matter, i.e.: 'States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating in all its forms and promoting understanding among the races', as elaborated in the elaborations, ICERD 2(1), a) through e).

⁵ R. v. Oakes [1986] 1 S.C.R. 103.