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Constituting Citizens

Oaths, Gender, Religious Attire

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The issue which consumed the final few weeks of the 2015 Canadian Federal Election began innocuously enough. Zunera Ishaq, a permanent resident in Canada and citizen of Pakistan, had completed all of the other prerequisites for naturalization and been scheduled to attend a citizenship ceremony on January 2014.[1] There was only one hitch – she intended to recite the oath while wearing her *niqab*.[2] The government banned such a practice. Alas, only *after* taking the oath do the participants become full-fledged members of the new home country to which they have sworn allegiance.[3] Without it, the naturalization process remains incomplete. Citizenship is not conferred.[4] Ishaq's religious practice thus appeared to bar her from acquiring full and equal membership in her new home country.

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1 These requirements include: lawful residency, physical presence in the country, language proficiency in English or French as well as demonstration of adequate knowledge of the country's history, institutions, symbols, and core constitutional values.

2 The *niqab* is a face veil worn by some Muslim women, leaving only the eyes revealed.

3 At the end of the ceremony, each participant receives his or her citizenship certificate, which offers legal proof of their newly acquired full membership status. *See* www.cic.gc.ca/english/resources/tools/cit/ceremony/oath.asp.

4 Citizenship Act, s. 24, RSC 1985, c. C-29. Taking the oath is a mandatory legal requirement of naturalization that applicants must meet to be granted citizenship. The minister may grant a waiver to this otherwise binding obligation to take the oath on compassionate grounds. These apply to minors under 14 years of age, persons incapable of forming intent or understanding the significance of taking the oath of citizenship by reason of mental disability, as well as discretionary "special cases." Citizenship Act, s. 3(3), 3(4), 3(6). An exemption may also apply in the case of citizenship granted on grounds of stateless as defined in s. 5(5) of the Act.

Citizenship tests and ceremonies have burst to the forefront of public and scholarly attention as countries across the world, primarily in Europe but also in traditionally immigrant-receiving societies such as Australia, Canada, the United Kingdom, and the United States. This contribution offers a comparative exploration of the culminating, performative act of *becoming* a citizen, without which the naturalization process remains incomplete: the citizenship oath. Why do states place a binding legal requirement on newcomers to take such an oath? What requirements may the admitting society impose on the transformative process of immigrant to citizen? Is it legitimate to impose a face-covering ban during the citizenship oath? What are the consequences of such a ban on the values of diversity and equality in a multicultural society? Proponents of such a ban argue that the oath is a public declaration that must be taken freely and openly; they construct face-veiled citizenship-candidates as distrustful, "hiding their identity" on the cusp of membership. This we might call the "distrusting" position. Opponents contend that the ban discriminates against minority women and restricts their religious freedom. They further ask what function or utility a citizenship oath may add to an already lengthy and tightly regulated process of naturalization. This I label the "trivializing" position. I will argue that both the distrusting and the trivializing positions overreach their claims and ultimately fail to persuade. Instead, I develop a perspective that emphasizes the links between control over women's bodies and religious attire in shaping identity-centered debates about continuity and change in sculpting the borders and boundaries of membership in the community. In rejecting the twin horns of the trivializing and distrusting positions, I wish to explore whether Canada's jurisprudence on questions of religious freedom, multiculturalism, and equality, while far from impeccable, nevertheless offers us resources to defend a position that seeks to neither erase diversity nor sacrifice equality.[5]

CITIZENSHIP-BY-NATURALIZATION

Naturalization, the mystical process by which the once-stranger is transformed into a constituent member, with all the rights and privileges pertaining to this legal status, has been variably described as "the most densely regulated and most politicized aspect of citizenship laws";[6] a filtering process that allows the recipient state to designate whom, among those *not* born as citizens,

[5] *See* Chapter 1 in this volume.

[6] Rainer Bauböck, Rainer and Sara Wallace Goodman, *Naturalisation*, EUDO Citizenship Policy Brief No. 2, at 1.

"we regard as our own – those to whom we owe a special obligation because they are fully-fledged members of our society";[7] "the central process of becoming part of a new country" by fostering a shared sense of commitment;[8] or, more critically, a "spectacle."[9] These various interpretations capture a range of meanings from the formal-legal to the relational-identitarian and expressive dimensions of citizenship and belonging.[10]

As the US Supreme Court memorably pronounced in *Wong Kim Ark*, there are "two sources of citizenship, and only two: birth and naturalization." The latter represents the *only* legal avenue for the acquisition of political membership after birth. Interestingly, the very term naturalization reflects an iconography of lineage, as well as its etymological roots. The word derives from *naturalis* (Latin), which means "confirmed by birth, according to nature"; the term naturalization implies that the post-birth admission to citizenship is a symbolic *rebirth* into the new membership community. As such, it is perceived as constituting a "rite of passage."[11] In the past, this act also simultaneously required renouncing or "erasing" previous allegiances to other political entities. Echoes of this history are still present today in the American naturalization oath of allegiance:

> I hereby declare, on oath (or, and solemnly affirm), that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; … and that I take this obligation freely, without any mental reservation or purpose of evasion; (so help me God).[12]

[7] Stephen H. Legomsky, *Why Citizenship?*, 35 Va. J. Int'l L. 279, 291 (1994).

[8] Noah Pickus, *Laissez-Faire and Its Discontents: US Naturalization and Integration Policy in Comparative Perspective*, 18 Citizensh. Stud. 160, 167 (2014) (referring to the view of naturalization expressed by American social reformers such as Jane Addams).

[9] Geoffrey Brahm Levey, *Liberal Nationalism and the Australian Citizenship Tests*, 18 Citizensh. Stud. 175, 186 (2014).

[10] Several scholars have referred to citizenship as capturing these various dimensions: status, rights, and identity. *See e.g.* Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity*, 11 Citizensh. Stud. 37 (2007). For other categorizations, *see* Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 Ethics 352 (1994).

[11] Tomas Hammar, Democracy and the Nation-State (Aldershot: Averbury, 1990).

[12] *See* 8 CFR 337.1(b). The oath also includes clauses referring to bearing arms on behalf of the United States and to performing noncombatant service in the US armed forces when required by law; a modification can be granted based on religious training and belief, or conscientious objection arising from a deeply held moral or ethical code. See INA 337(a)(5)(A) and INA 337(a)(5)(B).

In Canada, which will soon celebrate its sesquicentennial anniversary, entering the "Canadian family," as the citizenship oath is frequently described, still involves, to the surprise of many, swearing allegiance to the Queen of the Once-Dominion:

> I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.

The content of the oath has been subject to a recent legal challenge by three permanent residents from Toronto who claimed that, as holders of anti-monarchist views, obliging them to swear to "be faithful and bear true allegiance to Queen Elizabeth the Second, Queen of Canada, her Heirs and Successors" during the Canadian citizenship ceremony breaches their freedom of expression and freedom of conscience guaranteed by the *Charter of Rights and Freedoms*. Their case was heard by the Superior Court of Justice of Ontario and then by a three-judge panel at the Ontario Court of Appeal.[13] A major bone of contention between the parties was how to interpret the oath: whether to follow the plain meaning method of interpretation (the appellants' position) or to rely on the purposive approach (the government's submission).[14] The court followed the latter to the exclusion of the former. The judges reasoned that swearing allegiance to the Queen was not a "literal" act of submission to a foreign-seated head of state, but an oath affirming "our form of government, as symbolized by the Queen as the apex of our Canadian parliamentary system of constitutional monarchy."[15] Moreover, in contrast to the application judge's prima facie conclusion that s.2(b) of the Charter was infringed (saved by s.1), the appeal court decision held that would-be citizens' freedom of expression is not violated as they may criticize, or even recant, what they characterize as the objectionable elements of the oath after having taken it.[16] This argument did not bode well for the claimants, the reciprocal conditions of membership in the community require that they are obliged to first take an oath that contradicts sincerely held beliefs, in order to reserve the opportunity to later "disavow" that very same oath that formalized their rebirth

[13] *McAteer v. Canada (Attorney General)*, 2013 ONSC 5895 (Ontario Superior Court of Justice). The applicants appealed this decision and sought the remedy of making the reference to the Queen optional rather than compulsory. The Attorney General of Canada cross-appealed and challenged the finding that the oath violates the appellants right to freedom of expression.

[14] *McAteer v. Canada (Attorney General)*, 2014 ONCA 578 (Ontario Court of Appeal).

[15] *McAteer v. Canada (Attorney General)*, 2014 ONCA 578 (Ontario Court of Appeal).

[16] *McAteer v. Canada (Ontario Court of Appeal)*, para. 79.

into and acceptance by the new political community. This incongruous rationale runs the risk of trivializing "compulsory declarations of attachment," as Cass Sunstein once called pledges of allegiance administrated by modern governments; prime among them is the citizenship oath.[17] Such a sentiment was expressed by one of the claimants, a Princeton-educated University of Toronto math professor, who, after learning that the Supreme Court of Canada denied leave to appeal to hear the case, stated: "I misunderstood the law in Canada. I thought vows had meaning."[18]

In contrast with the *trivializing the oath* position, the government expressed a diametrically opposed stance in the controversy that surrounded the face-covering ban during the swearing-in citizenship ceremony. Here, the oath is taken seriously and sternly, reflecting a "matter of deep principle that goes to the heart of our identity and our values."[19] The government introduced the said ban in 2011, through internal guidelines formalized in the operational bulletin. This particular bulletin stipulated that participants in a citizenship ceremony, the final step of the naturalization process, would not be permitted to take the oath while wearing face covering.[20] In explaining the objective of the new rules, the minister of citizenship and immigration reasoned that: "The oath of citizenship and the citizenship ceremony is a solemn and essentially public time when the individual expresses his or her loyalty to Canada in front of fellow citizens . . . That is why I clarified yesterday that citizenship applicants will now be required to recite the oath in an open and transparent manner and to do so without being obscured by a face covering. This decision underscores the essentially public nature of the oath."[21] The minister further emphasized that the oath is *a* "public declaration that you are joining the Canadian family and it must be taken freely and openly."[22] In another public statement, Canada's citizenship and immigration minister

[17] Cass R. Sunstein, *Unity and Plurality: The Case of Compulsory Oaths*, 2 YALE J.L. & HUMAN. 101, 101 (1990).

[18] Jeff Gray, *Supreme Court Won't Hear Citizenship Oath to Queen Challenge*, THE GLOBE AND MAIL, February 26, 2015 (citing Dror Bar-Natan, one of the three claimants that brought the legal challenge before the court).

[19] Joanna Smith, *Muslim Women Must Show Face to Become Canadian Citizens*, THE TORONTO STAR, Dec. 12, 2011 (citing Jason Kenney, citizenship and immigration minister [as he was then]).

[20] Operational Bulletin 359, Dec. 2011, available at www.cic.gc.ca/ english/resources/manuals/ bulletins/2011/ob359.asp. The new policy states that "[c]andidates wearing face coverings are required to remove their face coverings for the oath taking portion of the ceremony."

[21] Jason Kenney, *Minister of Citizenship and Immigration*, Openparliament.ca (Dec. 13, 2011), https://openparliament.ca/debates/2011/12/13/jason-kenney-1/only/.

[22] Smith, "Muslim Women Must Show Face," *supra* note 19 (citing Kenney).

made an even stronger claim against face-veiled citizenship-candidates, as "hiding their identity."[23] This we might label the *distrusting of minorities* position.

Both the *distrusting* and the *trivializing* positions ultimately fail to persuade; they sidestep the core legal and philosophical questions at stake. What is the appropriate balance of religious accommodation or exemption that a newcomer on the cusp of membership can legitimately expect from their new country? What requirements may the admitting society impose on the transformative process of immigrant to citizen? These questions are anything but theoretical or abstract. The answers given to them bear immediate and concrete consequences in terms of defining burdens and opportunities. And the derivatives of these unanswered questions spiral out endlessly. Who must yield what, and according to what principles, to allow individuals to peacefully and openly interact in public spaces in a society which is officially committed to the values of diversity and equality? What are the background conditions and underlying values informing such compromises or trade-offs? Which responses are available through law and politics to situations whereby the language of social cohesion and coexistence is co-opted to promote ends and goals that are ultimately exclusionary?

Unlike the claimants who challenged the *content* of the oath due to the obligation to pledge allegiance to the Queen, Ishaq agreed with the content of the oath but objected to the *manner* by which she was compelled to take it, namely, with her face uncovered in public. As a devout Muslim woman, she sought exemption based on her religious belief from the government's policy that required her to reveal her face for the oath-taking portion of the ceremony.[24] Her request was denied by the government. She challenged the face-covering ban in court, claiming that it will deny her citizenship unless she betrays her conviction. A legal saga quickly followed. As it coincided with a heated national election campaign, Ishaq's legal battle trigged an acrimonious debate in the public sphere.[25] Polls showed that a majority of those surveyed

[23] Government of Canada, *Speaking Notes for The Honorable Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, On the Value of Canadian Citizenship* (Dec. 12, 2011), available at: www.cic.gc.ca/english/department/media/speeches/2011/2011-12-12.asp.

[24] She expressed a willingness to unveil her face if absolutely necessary to do so for identification or security reasons, but even then only privately in front of women. *Ishaq v. Canada (Citizenship and Immigration) 2015 FC 156 (Federal Court)*.

[25] Polls showed that a majority of those surveyed supported the government's position. Michael Friscolanti, *The Niqab: Trivial Politics, or Election Difference Maker?*, MacLean's Magazine, September 28, 2015 (citing pollster Darrell Bricker).

supported the government's position of demanding that one's face cover be removed for the oath portion of the citizenship ceremony.[26]

In court, government lawyer Negar Hashemi stated that "the case is about finding the 'right balance' between respecting differences and maintaining Canadian core democratic values." The *niqab* ban, she said, is part of a larger democratic scheme to ensure, via visual confirmation, that everyone vows loyalty to Canada, and that "there is no hidden agenda in this case."[27] The mention of a hidden agenda and the emphasis placed by the admitting society on vowing loyalty reveal core elements of the distrusting position. Those who favoured Ishaq's quest to take the oath without removing her face veil fell into the opposite trap. By claiming that the government's position was a political show and ideological imposition, they ignored altogether the value-laden disagreement that this policy evoked. The legal team representing Ishaq emphasized that there were fewer than 100 cases a year across Canada where someone wears a *niqab* to the ceremony, as if the value of constitutional and human rights is measured by the strength of their number rather than the principles they uphold. Another line of argument proclaimed that after having completed the lengthy and tightly regulated process of naturalization, it is unclear what function or utility the citizenship oath may add, again reflecting the trivializing position.

Ishaq's legal challenge was ultimately vindicated by the Federal Court and the Federal Court of Appeal. However, neither decision dealt with the constitutional issues at the heart of this controversy, namely, the ban's disproportionate effect on Muslim women who adhere to face-covering practices and their *Charter* rights to religious freedom and gender equality. Instead, both rulings relied on technical grounds, declining to answer the *Charter* questions posed by the case.[28] The government's leave to appeal to the Supreme Court of Canada was declined and we therefore have no judicial pronouncement by the country's highest court on these matters of vital importance in early twenty-first century law and politics.

This saga, despite its anti-climatic legal ending, provides an opportune occasion to explore the relations and tensions between conditioning access to citizenship on the removal of religious attire (worm primarily by women) and the broader Canadian multicultural promise – or "odyssey" – of promoting

[26] Michael Friscolanti, *The Niqab: Trivial Politics, or Election Difference Maker?*, MacLean's Magazine, September 28, 2015 (citing pollster Darrell Bricker).

[27] Nicholas Keung, *Ex-Immigration Minister Jason Kenney 'Dictated' Niqab Ban at Citizenship Ceremony*, court told The Toronto Star, Oct. 17, 2014 (citing *Negar Hashemi*).

[28] *Ishaq v. Canada (Federal Court)*, *supra* note 24; *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 194 *(Federal Court of Appeal)*.

both diversity and equality.[29] The *Canadian Charter of Rights and Freedoms* is globally unique in that it includes explicit commitments to the values of multiculturalism and gender equality.[30] Section 27 provides that: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," whereas section 28 states that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."[31] The Canadian social and constitutional experiment offers us a rare, living laboratory in which a thriving constitutional system searches for legal and institutional pathways to addressing the seemingly intractable demands, obligations, rights, and protections endowed by sections 27 and 28. The Canadian experiment is fascinating to explore because it attempts to give meaning to the entrenchment of *both* values. No other country has officially enshrined both multiculturalism (section 27) and gender equality (section 28) as interpretive provisions that reflect the "broad directions" and "aims" of its constitutional order.[32] The *niqab*-ban in citizenship ceremonies will serve as a test case to evaluate the promises and pitfalls of the "Canadian multiculturalism paradise." But we first need to step back and take in a broader comparative perspective.

CONSTITUTING CITIZENS THROUGH "WORDS THAT BIND": A BRIEF COMPARATIVE JOURNEY

Citizenship tests and ceremonies have attracted significant attention in recent years as a growing number of countries have introduced or revisited formal citizenship ceremonies for prospective citizens, or revamped linguistic and other naturalization requirements. In the United Kingdom, for example, the status of "citizen of the United Kingdom and Colonies" was established through the adoption of its Nationality Act of 1948. The current Nationality Act for British citizenship was adopted in 1981. However, only since 2004 have

[29] For elaboration of the Canadian odyssey theme, *see* the Introduction and Chapter 1 in this volume.

[30] The Charter also includes specific rights provisions dealing with religious freedom and equality in sections 2(a) and 15(1) respectively.

[31] While not entrenching particular rights, these interpretative provisions express core values of Canadian society and its constitutional order; they are to be taken into account in interpreting the meaning of a right or freedom guaranteed by the Charter, or in assessing the justifications of limits under section 1 of the Charter.

[32] *See* Walter S. Tarnopolsky, "The Equality Rights (ss. 15, 27 and 28)" in Walter S. Tarnopolsky and Gérald-A Beaudoin, The Canadian Charter of Rights and Freedoms: Commentary, 1st ed. (Toronto: Carswell, 1982), 441.

applicants for naturalization been required to take an oath of allegiance to the Queen as head of state and make a pledge to the United Kingdom:

> I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen.

In the United States and Canada, by contrast, citizenship oaths have a longer historical record. In the United States, the oath requirement dates back to the Naturalization Act of 1790. It has gone through several changes since, most importantly the removal of racial and gender exclusions that long barred access to full and equal citizenship for women and racialized minorities.[33] However, the individual pledge of allegiance required of those seeking membership in the American political community has remained consistent throughout.[34] In Canada, the oath was formalized in 1947, with the adoption of the Citizenship Act. At the time, the Act was considered vanguard legislation across the commonwealth, since it broke with past notions of empire and imperialism by establishing independent citizenship in Canada before such status was salient in the United Kingdom.

Recounting his own oath-taking experience as involving "great solemnity" and "intensification of my feeling about American citizenship," Felix Frankfurter, a naturalized citizen and justice of the US Supreme Court, reminded his fellow justices that "[i]t is well known that the convert is more zealous than one born to the faith." He went on to describe naturalization as an act of "entering a fellowship which binds people together by devotion to certain . . . ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution."[35] Taking this commitment seriously, and applying it to his judicial role, he held in a dissenting opinion in the *Schneiderman* case that a naturalized American could be deprived of his

[33] Of the vast body of literature exploring this history, *see e.g.* Ian Haney Lopez, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (New York: NYU Press, 1996); Nancy F. Cott, *Marriage and Women's Citizenship in the United States*, AM. HIST. REV. 103: 1440–1474 (1998).

[34] A standardized version of the oath only came into force in 1929. It has since been slightly amended; the basic structure holds, however, various commissions and a wide range of stakeholders that have called for updating the oath. US Citizenship and Immigration Services, Naturalization Oath of Allegiance to United States of America, available at www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america (last visited March 25, 2016). *See also* Pickus, *Laissez-Faire and Its Discontents*, *supra* note 7, at 162–163.

[35] From the Diaries of Felix Frankfurter 211–212 (J. Lash ed. 1975), cited in Levinson, *supra* note 30, at 1440–1441.

citizenship on the basis of adherence to certain political-ideological views (in this particular case: Marxism-Leninism), reflecting the same distrusting approach that we find reemerging half a century later in the Canadian debate.[36] In another landmark case, *Barnett*, involving a child who, as a member of the Jehovah's Witnesses, refused to take the pledge of allegiance at school, the majority reversed the child's suspension from school. Frankfurter, again in a minority opinion, held that the state could legitimately inculcate patriotism through the pledge of allegiance.[37] More contemporary reflections on Frankfurter's views challenge them as representing an over-muscular "new patriotism" that may coercively restrict individual freedoms as well as the rights of minorities or dissenters in the name of national (or majoritarian) interpretations that define the collective "we."[38]

Another manifestation of the competing views surrounding citizenship oaths is revealed by scholarship exploring the historical origins and ritual symbolism of swearing-in ceremonies. Critics have argued that such events are designed to artificially emphasize unity and conformity that conceals, counters or attempts to quell the reality of social heterogeneity.[39] Digging into the roots of naturalization oaths, Dora Kostakopoulou reminds us of the inequalities inherent in their medieval origins – "fealty" and the pledge of fidelity by the vassal to the feudal lord was publicly marked through the ceremony of homage, creating a mutual and indivisible bond between them.[40] In the history of the common law, the earliest and most influential theoretical articulation of the definition of access to membership – or, rather, at the time, "ligeance" under a fixed and hierarchical system of authority – is found in the landmark *Calvin's Case* (1608), where Lord Cook memorably stated that: "as the literatures or strings do knit together the joints of all parts of the body, so doth ligeance join together the sovereign and all his subjects."[41]

[36] *Schneiderman v. United States*, 320 US 118 (1943) (Frankfurter J., dissenting opinion).

[37] *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943).

[38] This influential articulation is found in Levinson, *Words that Bind*, *supra* note 30, at 1447. *See also* Sanford Levinson, *Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?*, 19 Wm. & Mary L. Rev. 113 (1987). As one commentator eloquently observes, a recurring theme in Levinson's work is a "certain distaste for, even wariness of, any form of blind allegiance or thoughtless conformity." *See* Sherman J. Clark, *Promise, Prayer, and Identity*, 38 Tulsa L. Rev. 579, 579 (2002).

[39] Cass R. Sunstein, *Unity and Plurality: The Case of Compulsory Oaths*, 2 Yale J.L. & Human. 101 (1990). The focus on the conditionality of conformity is drawn from Bryan S. Turner, "National Identities and Cosmopolitan Virtues: Citizenship in a Global Age," in *Beyond Nationalism? Sovereignty and Citizenship* (Lanham: Lexington Books, 2001), 199–200.

[40] Dora Kostakopoulou, The Future Governance of Citizenship (Cambridge: Cambridge University Press, 2008), 89.

[41] *Calvin's Case*, 77 Eng. Rep. 377 (K.B. 1608).

With the rise of the modern state, notions of citizenship as a relation of equality gradually replaced that of subjecthood, but to their detractors, naturalization oaths are still charged with this ideologically encumbered past. In contemporary societies, the manifestation of such vestige is arguably found in the search for "'bonds of mutual understanding' [that] depend on the conformity of newcomers to the terms of integration articulated by the majority community."[42]

Those who view naturalization regimes in a more sympathetic light stress the symbolic value of the inductions and ceremonies that immigrants undergo at the very moment that they legally transition into citizenship. Capturing the "rite of passage" quality of the process, this more affirmative sentiment is captured by the recognition that joining a new political community is a constitutive moment for *both* the newcomers *and* the society they join. As one scholar put it:

> Moving to a new society with a view to full membership is a significant transition in anyone's life. It is also a significant moment for the host society. Human beings down the ages have marked such transitions with inductions and ceremony. Becoming a citizen of a new political community would seem to warrant at least as much fuss.[43]

In Australia, for example, not only immigrants partake in oath- and pledge-taking during the final stage of the naturalization process. Individual born Australian may also participate in affirmation ceremonies (as they are known), if they so wish, to "publicly affirm their loyalty and commitment to Australia and its people."[44] These ceremonies bear no legal standing, but were introduced by the federal government in response to popular demand by those who do not require such official "induction" into the political community due to their fortuitous circumstances of birth.[45] Manifesting explicitly an emphasis on affirming affiliation to "the polity, its political institutions and norms, and its people," Australia revoked the oath of allegiance to the Queen and replaced it with a citizenship pledge of commitment, which reads as follows:

> From this time forward, (under God,) I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.

[42] Kostakopoulou, *The Future Governance of Citizenship*, *supra* note 40, at 99.
[43] Levey, *Liberal Nationalism and the Australian Citizenship Tests*, *supra* note 9, at 185.
[44] Government of Australia, Citizenship Affirmation Ceremonies.
[45] Levey, *Liberal Nationalism and the Australian Citizenship Tests*, *supra* note 9, at 186.

But unique to Australia's oath is the view that citizenship pledges are relevant to *both* newcomers *and* settled populations as they are joined through public rites of passage and words that bind. Even here, however, inequality persists: participation in citizenship ceremonies is binding and compulsory for those not born as citizens while it remains purely volitional for those who gained such status by virtue of the birthright lottery.[46]

Questions surrounding access to citizenship have become ever more pressing in recent years as new and more demanding citizenship integration requirements have proliferated across Europe, requiring newcomers to explicitly pronounce their acceptance of the "values, culture, and practices of the host society."[47] Some of these new tests extended beyond civic knowledge acquisition; they probe into the "inner disposition" of applicants with regard to sensitive topics such as gender, religion, culture, marriage, same-sex relations, etc., leading scholars and critics to dub them as objectionable manifestations of "illiberal liberalism."[48]

Even if we accept that intrusive moral inquisition by state officials has no place in the naturalization process (as I believe is the case), citizens-in-the-making are routinely expected to demonstrate civic knowledge of the new country's political system, history, and governing institutions. Still, we might ask: is it fair that those not born as members are subject to what has been labeled a "probationary period" for many years before they can become full members, whereas those born into the political community are automatically granted the coveted prize of citizenship? Without fully resolving this dilemma, some have proposed that naturalization should be activated automatically if a person is "inhabiting a place," or residing in the country for a fixed number of years, without subjecting them to an additional demanding process of providing proof of language proficiency, civic integration, and successful passage of citizenship testing.[49]

Returning briefly to Ishaq's case, the idea of automatic naturalization would have entailed that as an aspiring citizen she would have had to do nothing

[46] For further discussion, *see* Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (Cambridge, MA: Harvard University Press, 2009). *See also* Ayelet Shachar, "Citizenship" in Andres Sajo & Michel Rosenfeld, eds., *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1002–1019.

[47] Pickus, *Laissez-Faire and Its Discontents*, *supra* note 7, at 161

[48] *See* Liav Orgad, The Cultural Defense of Nations: A Liberal Theory of Majority Rights (Oxford: Oxford University Press, 2015). For comparative data, *see* Sara Wallace Goodman, Immigration and Membership Politics in Western Europe (Cambridge: Cambridge University Press, 2014).

[49] Ruth Rubio-Marin on automatic naturalization; Dora Kostakopoulou on civic registration model. For critical accounts, *see*, *e.g.*, Rainer Baubock.

other than stare at the clock and wait for the passage of time (say, five years of lawful residence) before she would, mechanically, become a citizen at the stroke of midnight. This model waives linguistic competence requirements, abandons any requirement of public expression of familiarity with and willingness to adhere to the new home country's laws and constitutional norms. Some fear that such a vision of inclusion would in fact discourage integration into the fabric of society because it deserts the aspiration of creating some social glue or "shared values," however difficult it remains to pin down these shared values.

In practice, no country adheres to the model of automatic naturalization, although many polities provide expedited citizenship to "co-ethnic" returnees on account of presumed shared identity that transcends space and time. In Canada, however, all newcomers, whether they have arrived as family members, economic migrants, or humanitarian causes, must pass the standard naturalization process. Hence, we are still left with the nagging question: is it legitimate to demand that at the very moment they are committing to join the "Canadian family," as government officials repeatedly stated in the political storm that surrounded the face-covering citizenship-ban legal challenge, a female member of a minority community be forced to shed religious attire that expresses her sincere religious belief? Which perspectives should prevail: the sensitivities of the majority or minority communities' "claims of culture"?[50] These are the unanswered queries that the Ishaq saga has left open. Given that different countries adhere to different citizenship models (liberal, republican, multicultural, ethnonational, among others), they may choose to resolve this question differently, but our focus here is not on providing a universal answer. Rather, my inquiry is more narrowly and modestly tailored to identify the parameters that would define a made-in-Canada solution. Using this test case, I seek to explore whether the Canadian experiment can succeed in creating the alchemy of accommodating diversity with equality. It is useful to step back in time, roughly half a century ago, to acquaint ourselves

[50] This term is drawn from the title of an influential book: Seyla Benhabib, The Claims of Culture: Diversity and Equality in the Global Era (Princeton: Princeton University Press, 2002). These claims are understood here as socially constructed, complex and multidimensional. In the legal context, they are typically referred to as intersectional claims for recognition that cannot be easily disaggregated or reduced to one axes only, such as religion, gender, tradition or intra- and inter-group demands for social change, as they intersect and interlace in complex ways. For a classic elaboration of intersectionality (in a different context), *see* Kimberly Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 U. Chi. Legal F. 139 (1989).

with the genesis of the invention of Canadian multiculturalism as an official government policy – the first in the world.[51]

CANADA'S MULTICULTURALISM

The "multi" in Canadian multiculturalism represents an explicit rejection of the once unquestioned approach of privileging the dominant majority culture(s) while relegating minority communities to a marginalized, second-class position.[52] In Canada, the government policy of multiculturalism, articulated in 1971 and predating the *Charter*, rested on a combination of empirical and normative justifications for rejecting mono- or bi-culturalism: "In the face of this [country's] cultural plurality there can be no official Canadian culture or cultures," resoundingly stated a special joint parliamentary committee charged with the task of developing Canada's new constitutional bill of rights, the Canadian Charter of Rights and Freedoms.[53] As part of this effort, a new vision was crafted of a "pluralistic mosaic," promoting "equal respect for the *many* origins, creeds and cultures" that form Canadian society.[54]

In the post-Charter era, the earliest judicial pronouncement on religious freedom is found in the landmark decision of *R. v. Big M Drug Mart Ltd.*, in which the Supreme Court of Canada struck down the *Lord's Day Act*, a federal "Sunday closing law" prohibiting businesses from opening on Sunday, effectively protecting the sanctity the Christian Sabbath.[55] In an oft-cited paragraph of that decision, the Court stated that: "What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not ... be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of the 'tyranny of the majority.'"[56] This last point is crucial. The majority of Canadians may accept Sunday as the Lord's Day, but this does not represent the perspective of religious minorities in Canada, be they members of the Jewish faith,

[51] Government of Canada, *Canadian Multiculturalism: An Inclusive Citizenship*, available at www.cic.gc.ca/english/multiculturalism/citizenship.asp.

[52] This section draws upon the argument developed in Ayelet Shachar, *Squaring the Circle of Multiculturalism? Religious Freedom and Gender Equality in Canada*, 10 LAW AND ETHICS OF HUMAN RIGHTS 31 (2016).

[53] *Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (1972). The governmental policy was initially framed as "multiculturalism within a bilingual framework."

[54] *An Act Amending the Constitution*, Bill C-60, s. 4 "[emphasis added]."

[55] RSC 1970, c. L-13; *R. v. Big M Drug Mart Ltd.*, [1985] SCJ No. 17, [1985] 1 SCR 295 (SCC).

[56] *Id.*, at paras. 94–96.

Sabbatarians, Muslim Canadians, agnostics, or those with no theistic belief. As Dickson J. (as he then was) said, speaking for the Court: "To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians."[57] The Lord's Day Act, continues the Court, "takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike."[58] It is at this stage of the analysis that section 27 is brought into the discussion: "to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion [the dominant majority religion] is not consistent with the preservation and enhancement of the multicultural heritage of Canadians."[59]

The *Big M* pronouncement forbidding direct compulsion is now deeply entrenched in Canadian law.[60] The Supreme Court of Canada recently referred to cases involving religious compulsion as "straightforward"; they fail the test of constitutionality without even triggering a balancing or proportionality analysis.[61] It is worth noting, however, that what is considered straightforward in Canada does not necessarily translate to other jurisdictions. Unlike the Supreme Court of Canada, other distinguished courts (whether national or supranational) have been reluctant to declare practices and policies enforcing majoritarian values as a "form of coercion inimical to the Charter [or other human rights instruments] and the dignity of all non-Christians."[62] Consider, for instance, the much-discussed *Lautsi* decision handed down by the Grand Chamber of the European Court of Human Rights ("ECtHR"), the apex judicial body in the European human rights system, entrusted with interpreting the provisions of the European Convention on Human Rights.[63] In *Lautsi*, the Grand Chamber of the ECtHR overturned an earlier unanimous decision by the Chamber. In it the Grand Chamber ruled that given the wide

[57] *Id.*, at para. 97 [58] *Id.*, at para. 98.

[59] *Id.*, at para. 99. The emphasis on removing majoritarian religious indoctrination (*e.g.*, the "Lord's Prayer") is also found in constitutional challenges raised in the public school context.

[60] This case has received not only favorable, but also unfavorable appraisal by legal commentators. *See, e.g.*, Benjamin L. Berger, *Law's Religion: Rendering Culture*, 45 Osgoode Hall L.J. 227 (2007).

[61] *Alberta v. Hutterian Brethren of Wilson County*, [2009] SCJ No. 37, [2009] 2 SCR 567, at para. 93 (SCC) [hereinafter "*Hutterian Brethren*"]; *R. v. Oakes*, [1986] SCJ No. 7, 1986] 1 SCR 103 (SCC).

[62] *Big M*, *supra* note 57, at para. 97.

[63] *Lautsi v. Italy*, No. 30814/06 (Eur. Ct. H.R. March 18, 2011) (European Court of Human Rights, Grand Chamber) [hereinafter "*Lautsi* (Grand Chamber)"]; *Lautsi v. Italy*, No. 30814/06 (Eur. Ct. H.R. Nov. 3, 2009) (European Court of Human Rights, Chamber).

variety of approaches adopted by European states regarding the place of religion in public schools, the Italian regulations requiring the prominent display of the crucifix in every classroom in state-run schools fall within the margin-of-appreciation owed to domestic authorities to "perpetuate a tradition," here, the tradition of the *majority* religion (Catholicism) in Italy. In effect, this decision means that children from different faiths, backgrounds and ways of life, including non-Christians and those professing no religion, will continue to be educated under the cross – literally – in Italian public schools.

The *Lautsi* decision has been criticized as taking a pro-majority stance in the "cultural wars currently raging in Europe [in which] the relationship between the majority and minorities in society, the extent of their respective claims to shape the social, cultural, and intellectual environment, and the role of the state in their tug-of-war is the source of recurring tensions."[64] Under the non-coercion variant of the fair inclusion framework informing the Canadian multiculturalism experiment, a decision like *Lautsi* would be objectionable in that it upholds, rather than dismantles, the "compulsory display of a symbol of a particular [majority] faith in the exercise of public authority," thus breaching the duty of neutrality and fair inclusion as non-coercion.[65] Recall that s.27 instructs that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of *Canadians*," not the preservation and enhancement of the heritage of a *majority* tradition or community in Canada. By contrast, the *Lautsi* decision reflects the continued privileging of the majority tradition and the use of the force of the law to inculcate certain values to a "captive audience" in and through a quintessential public institution: the public school.[66] In lieu of multiculturalism, it endorses *mono*culturalism by granting permission to display a "primarily religious symbol" (as the Strasbourg Court put it) – the crucifix – in every state-run classroom where attendance is compulsory regardless of religious convictions or lack thereof.

[64] Dimitrios Kyritsis & Stavros Tsakyrakis, *Neutrality in the Classroom*, 11 Int'l J. Const. L. 200, 200 (2103).

[65] Importantly, the earlier unanimous decision in *Lautsi* (Chamber), which sided with the applicant against Italy's position, fully acknowledged the concern with compulsion and coercion, especially in the realm of education, holding that: "The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of 'democratic society' within the Convention meaning of that term." *See Lausti* (Chamber), paras. 56–57.

[66] As the Chambers' ultimately-overturned *Lautsi* decision stated: "The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions." *Id.*, at para 47.

As comparative constitutional scholars have rightly observed, legal disputes such as *Lautsi* have come to the fore because the ECtHR itself has become a core arena where "some of the most challenging debates around European legal pluralism [now] take place, and its case law has centrally contributed to shaping the terms of such controversies,"[67] turning courts into the arenas in which core societal values are contested.[68] Moreover, it is increasingly recognized that the legal arena has become a strategic space for, not only exploring the "nature of religious communities, their relationship to state institutions, and the place of minority religious communities in society," but also for re-examining "the place, role and rights of the 'Christian majority'" in Europe.[69] These are highly charged issues (which have become intertwined with a deepening "cultural anxiety" about national identities and shared values perceived to be under threat and in danger of being "overwhelmed" by the members of minority religious communities, thus feeding into a dangerous narrative of "*nous*" *et les* "*autres*") create a binary, zero-sum dynamic of "us" versus "them."[70] Canada is not immune to these pressures. However, these trends have been slower to take hold in Canada than elsewhere, arguably in part due to the fact that plurality and heterogeneity of peoples has always been part of that country's history. Since its introduction, a core goal of Canada's official multiculturalism policy has been the dismantling of majoritarian dominance and its replacement with a commitment to equal citizenship as safeguarding diversity-in-unity.[71]

The legal commitment to non-coercion can therefore be thought of as a concrete articulation of a broader normative principle and policy of fair inclusion: the removal of negative background conditions, statutes or regulations that may appear or purport to be neutral but in fact are "implicitly tilted towards the needs, interests, and identities of the majority group."[72] Beyond it lies a vast range of positive, concrete and often case-by-case exemptions and

[67] Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence*, Oxford J. L. & Religion (advance access), at 2 (2015). More generally, *see* Ran Hirschl, Constitutional Theocracy (Cambridge, MA: Harvard University Press, 2010).

[68] For extensive discussion, *see* Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 Am. Polit. Sci. Rev 93 (2008).

[69] Fokas, *supra* note 69. [70] Ralph Grillio, "Reasons to Ban"; Benhabib, *supra* note 52, 24–26.

[71] The term diversity in unity appears in *Discover Canada*, the official study guide issued by the government for citizenship applicants who seek to naturalize, a carefully regulated process that culminates with a public citizenship test. On the concept of the social imaginary, *see* Charles Taylor, Modern Social Imaginaries (Durham, NC: Duke University Press, 2007).

[72] Will Kymlicka & Wayne Norman, "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts" in Will Kymlicka & Wayne Norman, eds., Citizenship in Diverse Societies (Oxford: Oxford University Press, 2000), 4.

accommodations from otherwise generally applicable laws, rules, regulations and other binding governmental policies. As we have just seen, refraining from coercively using state power to privilege the tradition(s) of the majority is anything but trivial.

The citizenship oath presents a more complex challenge, however, as it touches on the foundational question of defining "who belongs," or ought to belong, and according to what criteria. Does this requirement impose the traditions of the majority (however difficult they remain to define) in ways that make it objectionable as a coercive use of state power to promote what is (essentially) a partial position not fitting in a diverse and multicultural society, or is it a legitimate *civic* requirement that state officials may pursue to generate the "social glue" that holds us together beyond our acknowledged or self-professed differences? The jurisprudence on religious freedom under the *Charter* provides some useful guidance, although not a clear-cut answer. Writing for the majority in *NS* (a case examining whether a witness in a criminal trial may testify while donning a *niqab*), Chief Justice Beverley McLachlin reiterated that when faced with conflicts between freedom of religion and other values the Canadian tradition has been to respect the individual's religious belief and to accommodate it if at all possible.[73] In light of this framing of the analysis, the Court held that a total ban on the *niqab* is an intrusion by the state that is inconsistent with the *Charter*.

The debate about the relevance of the interpretative commitment to multiculturalism to the analysis is most evident in the concurring opinion by LeBel J., which endorsed stability and continuity in responding to today's winds of multicultural change (reminiscent, in this sense, of recent European trends), insisting that the "openness of the trial process" requires a *categorical* ban on *niqabs* in the courtroom. In contrast, the dissenting opinion reached a diametrically opposed conclusion: while "conced[ing] without reservation that seeing more of a witness' facial expression is better than seeing less," Abella J. held that the assessment of demeanour can be reasonably achieved without seeing the bare (or "naked") face.[74] While the debate among the justices focuses on the technical difficulties of assessing demeanour, the case reveals a far deeper disagreement: it turns the veil into a test case for determining how

[73] *R. v. NS*, [2012] 3 SCR 726 (SCC). at para. 54. *See also* para. 51: rejecting the view that the *niqab*-wearing practice should be banned because it breaches "neutrality," the Chief Justice powerfully stated that such an approach is "inconsistent with Canadian jurisprudence, courtroom practice, our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible."

[74] The "naked face" imagery is somewhat provocatively evoked in this context, as a rhetorical tool to emphasize the harm that a woman may be exposed to.

far the principle of religious freedom will go when it fiercely conflicts with other protected *Charter* rights (in this case, the right to a fair trial), how to conceptualize the balance between stability and change in an increasingly diverse society, and how to navigate the competing interests of religious freedom, the right to a fair trial and access to justice for minorities-within-minorities, here, *niqab*-wearing Muslim women.

As a minority woman and a sexual assault complainant, NS's religious freedom claim also encapsulates a powerful plea for fair inclusion and equal access to justice for all women, including minority women who profess a non-dominant religious belief or practice. In this way the judgment also might be seen as relevant to section 28 (although that provision was not discussed in the decision). The value of fairness to the complainant and the broader societal interest of not discouraging *niqab*-wearing women from reporting offences and participating in the justice system is vital to the analysis; indeed these considerations are now part of the public record, expressed powerfully by the dissenting opinion and echoed in the majority's reasoning.[75] The Supreme Court of Canada ultimately adopted a contextual, case-by-case approach, resisting the idea that users of the justice system must "park their religion at the courtroom door," just as it rejected the response that says that "a witness can always testify with her face covered."

This contextual balancing approach allows courts in Canada to *avoid* grandiloquent value judgments of the face-covering practice. As Abella J. noted in her dissenting opinion, controversies surrounding the *niqab* are prevalent both within and outside the Muslim community. These controversies include questions such as "whether the *niqab* is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it."[76] Justice Abella further states:

> These are complex issues about which reasonable people can and do strenuously disagree. But we are not required to try to resolve any of these or related conceptual issues in this case, we are required to try to transcend them in order to answer only one question: Where identity is not an issue, should a witness' sincerely held religious belief that a niqab must be worn in a courtroom, yield to an accused's ability to see her face.[77]

This lucid analytical approach, with its steadfast resistance of armchair social theory, allows Canadian courts to avoid the trap of *abstractly* stipulating

[75] Access to the courts by sexually assaulted women, an issue central to the dissenting opinion of Abella J., has been identified by the Chief Justice of the Supreme Court as "most pressing."

[76] *Id.*, at para. 80. [77] *Id.*

inconsistencies between diversity and equality. Perhaps the most important conceptual lesson to be drawn from *NS* is that the adoption of a contextual, "*in concreto*" case-by-case approach that remains grounded in the law and facts of each particular dispute, even if it does not offer a perfect solution, is preferable when considered against the tendency towards the *abstract* declaration of irreconcilable value conflicts demonstrated by European courts as we shall explore below.

CONTEXT AND MEMBERSHIP MATTERS

Consider the contrast between the Canadian approach of side-stepping the debate about the symbolic meaning of the veil (and whether it is mandatory for Muslim women at all) and the framework of analysis emerging from Europe's highest human rights court, as reflected in the ECtHR's engagement with respect-for-differences claims brought by women who wish to practice a less extensive form of veiling, namely, donning the *hijab* (a head cover worn by some Muslim women, in which the face remains visible). Much like the decision in *N. (S.)*, the European Court of Human Rights decisions in the *hijab* cases of *Dahlab* and *Sahin* engage in proportionality analysis and balancing of competing interests.[78] The difference lies in the level of abstraction. Whereas in *NS* the Supreme Court of Canada endorses a contextual approach, reserving the ultimate balancing decision for the closest-to-the-ground judicial authority (the presiding judge), in *Dahlab* and *Sahin* the "'balancing' that takes place is a balancing of abstract stipulated inconsistencies (secularism and democracy vs. the religious symbolism of the veil; women's equality and tolerance vs. Islamic religious obligation) rather than evidentially demonstrated *in concreto* conflicts of rights with other rights, or of rights with important public interests."[79]

Similar concerns about the Strasbourg court "sacrific[ing] concrete individual rights guaranteed by the Convention to abstract principles" were even expressed by the two dissenting judges in the recent *SAS* decision, in which the majority of the ECtHR ultimately upheld the French legal ban that prohibits the wearing of face-veils in public.[80] In that decision, denounced by critics as reinforcing the ostracization of Islam as a minority faith, the Court

[78] *Dahlab v. Switzerland*, No. 42393/98, [2001] V ECHR 447; *Leyla Sahin v. Turkey*, No. 44794/98, [2005] XI ECHR.

[79] Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 South Atlantic Quarterly 9 (2014).

[80] *SAS v. France*, No. 43835/11, [2014] (joint dissenting opinion of judges Nussberger and Jadelblom, at para 2).

relied on the French government's argument that promoting "living together" (*le 'vivre ensemble'*) is a legitimate ground for restriction of fundamental rights protected by the Convention. To understand this last point, some background regarding the challenged legislation is required. In 2010, France became the first country in the world to criminalize the wearing of face veils, such as the *niqab*, anywhere in public – with the exception of houses of worship.[81] The draft of the 2010 Law included an explanatory memorandum that stated that "[e]ven though the phenomenon, at present, remains marginal, the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic." The law was passed by the National Assembly by an overwhelming majority (335 votes in favor, one vote against, and three abstentions). The Senate also followed suit with 246 votes in favour and one abstention. In drafting the legislation, as part of its fact-finding mission a parliamentary committee concluded that "the wearing of the full-face veil on national territory" was a recent phenomenon in France, and by the end of 2009, was only practiced by about 1,900 women out of France's 4.7-million-strong Muslim population. This is a ratio of less than 1 in 2500 so there must have been something deeper reasons that motivated this legislative policy.

In the context of heightened political and legal tensions surrounding an "ostentatious" expression of a minority identity that is increasingly perceived as threatening and "foreign" in Europe, it is hard not to be reminded of William Blackstone's observation that whereas civil injuries are "an infringement . . . of the civil rights which belong to individuals . . . public wrongs, or crimes . . . are a breach and violation of the public rights and duties, due to the whole community."[82] The act of defining an expression of particular, more conservative, variants of the Islamic faith as a public wrong bears not only a punitive function, but also an *expressivist* meaning: the outrage of the majority community against what it perceives as an offensive repudiation of *laïcité* and other foundational values of the republic. From that vantage point, the person who breaches the criminal code's prohibition against face-veiling acts in violation of the whole community and its "common culture." In this way, the criminal code – and the state machinery that enacts and enforces it – expresses moral condemnation of the *actor*, not just the prohibited act. The face-veil banning legislation advances a particular vision of the public sphere that sheathes popular anxieties about the majoritarian discomfort of living side by side with veiled Muslim women who are *de jure* included in the polity, but are *de facto* ostracized as the "Other." Tremendous political capital is invested in such

[81] In France, the terminology of face veils confusingly conflates *niqab* and *burka*.
[82] Blackstone 1765–69 [1825], Book IV, Ch. 1, p. 5, para. 1.

laws as symbolic manifestations of an idealized "France [which] is never as much itself, faithful to its history, its destiny, its image, than when united around the values of the Republic: liberty, equality, fraternity," as the 2010 Law explanatory memorandum reads.

From the official French statist perspective, however, prohibiting such expression of religious minority identity, or "sectarianism," is not a failure of fair inclusion but merely a manifestation of the constitutionally entrenched *laïcité* principle, dating back to 1905, which resists *any* expression of religiosity as a breach of neutrality and secularism; it also a necessary measure for promoting social cohesion. However, this framework fails to take context into account – in which using the full force of the power of the state to legally prohibit a member of a minority community from expressing certain aspects of her religious identity holds additional dimensions of marginalization and exclusion. Equality among citizens is affected by defining her "veiled" presence in public spaces as harmful to others. These other dimensions are camouflaged when the statist discourse simply claims to be evenhandedly applying facially-neutral laws, practices and policies – a point that advocates of fair inclusion as non-coercion and accommodation have long emphasized in Canadian debates.[83] To put this last point differently, absent from the official narrative is an account of the power relations and context in which the encounter between the ("sectarian") individual and the ("universal") state occurs. The ECtHR, alas, sided with the latter over the former. It cited the French parliamentary report that described the practice of face-veiling as "at odds with the values of the Republic," implicitly reinforcing, in direct contrast to Canada's *Big M* approach, the power of a dominant majority to impose *its* (in this case, secularist) worldview by means of national, purportedly neutral, legislation that in effect imposes concrete and predictable burdens and restrictions on the protected rights of members belonging to already marginalized religious minority communities. Yet as we have seen earlier in the discussion, in the resounding words of *Big M*: "What may appear good and true to a majoritarian … group, or to the state acting at their behest, may not … be imposed upon citizens who take a contrary view."

Unlike the French approach, the Supreme Court in *NS* had no interest in ascribing meaning to the wearing of the *niqab* or making a judgment regarding whether that meaning accorded with Canadian values. This contextual approach helps avoid the dangerously charged terrain of assumed

[83] This point has been elaborated by many a political theorist, *see, e.g.*, Kymlicka and Norman, *supra* note 72; in legal terminology, we would refer here to the prohibition against both direct and indirect discrimination.

(rather than proven) tensions and inconsistencies. As Canadian courts have repeatedly stated, even if a given law and regulatory scheme promotes an important social goal, the burden is on the government to explain why a significantly less intrusive and equally effective measure was not chosen and to demonstrate that the chosen measure only minimally impairs the protected rights and interests at stake.[84] This is especially true given the profound significance of citizenship, which has been described as "nothing less than the right to have rights" by the US Supreme Court (echoing the famous words of philosopher Hannah Arendt); any restrictions must be narrowly tailored and operate as a last resort only, for at stake is the vital membership and dignity interest of the individual.[85]

TROUBLES IN PARADISE: WHEN DIVERSITY AND EQUALITY COLLIDE

Even in multicultural Canada, tensions have arisen in recent years surrounding questions of membership and belonging. As in other countries, the laws and regulations governing citizenship reveal much about the society that constructed them, telling us "who the state considers a full member, how that membership is transmitted inter-generationally, and how it can be lost, gained, and reclaimed."[86] The history of access to citizenship in Canada still bears the scars of past exclusion on the basis of considerations such as race, gender, national origin, religion and indigenous status.[87] While Canada now rightly takes pride in being an open, multicultural society that welcomes immigrants from the four corners of the globe, any restrictions on the basic right to have rights appearing to target a particular group of settled immigrants or newcomers as "too different" may taint this reputation and confirm a sense of injustice felt by those affected.

As mentioned earlier, in 2011, a ban was introduced that instructed government officials to ensure that participants in a citizenship ceremony, the final

[84] *See* the classic *R. v. Oakes* [1986] SCR 103 (establishing the "Oakes test").

[85] *Perez v. Brownell*, 356 US 44, 64 (1958) (Warren C.J., dissenting opinion). Hannah Arendt, The Origins of Totalitarianism (New York: Harcourt, Brace and Jovanovich, 1968 edition)177: "We became aware of the existence of a right to have rights . . . and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights." *See also* Shachar, "Citizenship," *supra* note 46.

[86] Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 NYU. L. Rev. 11 (2006), at 20.

[87] For a concise historical overview of such exclusionary measures, *see* Ninette Kelley and Michael Trebilcock, The Making of the Mosaic: A History of Canadian Immigration Policy (Toronto: University of Toronto Press, 1998) 132–163.

step of the naturalization process, will not be permitted to take the oath of citizenship while wearing a face covering. On judicial review, this policy was described as "superfluous," in that neither the regulations nor the Citizenship Act required visual confirmation of the oath being recited.[88] The government, however, held its ground. A spokesperson for the immigration minister responded to the Federal Court ruling by stating that: "[n]ew citizens are obliged to confirm their identity when taking the Oath of Citizenship . . . it is simply common sense to require removal of facial coverings or other items that hide new citizens' mouths from view. The oath, knowledge and language tests . . . are among the basic requirements for joining the family of Canadian citizens."[89] The prime minister used even sharper language as he announced, symbolically in Quebec – the stronghold in Canada of a more "European" perception of state-religion relations – that the government intended to appeal, remarking:

> I believe, and I think most Canadians believe that it is offensive that someone would hide their identity at the very moment they are committing to join the Canadian family.[90]

The characterization of veiled oath taking as "offensive" by top government officials is arguably a manifestation of a majority-infused statist vision of "living together," echoing the positions we have already seen in the French face-veil ban and the *SAS* decision, despite the fact that Canada's constitutional tradition has never adhered to the *laïcité* principle. This belligerent rhetoric may, however, run amok and lead us to the (misguided) conclusion that, in order achieve fair inclusion and equal footing with other members of the shared political community, some members, but not others, will have to relinquish a sincerely held belief or be asked to denounce certain elements of minority identity that they view as constitutive of who they are and how they perceive themselves.

[88] *Ishaq v Canada (Federal Court)*, *supra* note 25.

[89] Nicholas Keung, *Niqab Ban at Citizenship Ceremony Struck Down by Court*, The Toronto Star, Feb. 6, 2015, available at www.thestar.com/news/immigration/2015/02/06/niqab-ban-at-citizenship-ceremony-struck-down-by-court.html (citing the spokesperson for then Minister of Citizenship and Immigration, Chris Alexander).

[90] The "offensive" terminology was used by Canada's Prime Minister during a public meeting in Quebec and received significant coverage in the media. It was also later repeated in a Conservative party email signed by Chris Alexander, Minister of Citizenship and Immigration, soliciting signatures by those who "agree with our prime minister." *See, e.g.*, Morgan Lowrie, *Harper Says Ottawa Will Appeal Ruling Allowing Veil during Citizenship Oath*, The Globe and Mail, Feb. 12, 2015, available at www.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/.

This rising "paradigm of suspicion," as one scholar has put it, is embedded in a larger narrative dating back to the early decades of the 2000s.[91] The Canadian Government had launched a campaign to "reinforce the value of Canadian citizenship," generating a spate of legislative and executive initiatives. Preventing women wearing the face-cover from accessing the citizenship ceremony is merely symptomatic competing currents between the "trivializing" and distrusting" positions.[92] Such heightened emphasis on expressing and demonstrating "loyalty" by erasing certain markers of religious or other identity-based minority affiliation is, alas, foreign to the letter and spirit of the concept of Canadian multiculturalism and fair inclusion as developed through jurisprudence. As the majority enunciated in *NS* when considering whether a witness may wear the *niqab* in court, "to remove religion from the courtroom is *not* the Canadian tradition. Canadians have, since the country's inception, taken oaths based on holy books – be they the Bible, the Koran, or some other sacred text."[93] The same considerations should, by analogy and with equal force, be applied in the context of taking the oath in a citizenship ceremony, where religious and cultural identities are to be celebrated according to Canada's multicultural tradition rather than forcibly removed from the public sphere.[94]

The face-veiling ban in citizenship ceremonies also stands in tension with the official version of multiculturalism that Citizenship and Immigration Canada itself publically endorses:

[91] Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23 Sociological Theory 197 (2005).

[92] *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22; Citizenship and Immigration Canada, "Backgrounder - Strengthening the Value of Canadian Citizenship: Amending the *Citizenship Act* to Protect the Integrity of Canadian Citizenship," available at www.cic.gc.ca/english/department/media/backgrounders/2010/2010-06-10.asp. The government also tabled the *Zero Tolerance of Barbaric Cultural Practices Act* (turning polygamy into an inadmissibility ground), which, given its provocative title, has led commentators to suggest that by using the term "barbaric" the government is "targeting particular [racialized immigrant] communities and the does not see the problem of polygamy and early and forced marriage as a 'Canadian issue,'" thus "sending a political message with this legislation." *See* Kim Mackrael, *Experts Question Need for Polygamy Bill*, The Globe and Mail, A4, Nov. 6, 2014. The implied contrast between "civic/civilized" and "barbaric" that informs this legislation contributes to the construction of a dangerous "us"–"them" dichotomy, as discussed earlier.

[93] *N. (S.)*, *supra*, note 79, at para. 53 [emphasis added].

[94] Canada's Citizenship Regulations, SOR/93-246 requires in s. 17(1)(b) that citizenship judges "administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof."

> In 1971, Canada was the first country in the world to adopt multiculturalism as an official policy. By so doing, Canada affirmed the value and dignity of all Canadian citizens regardless of their racial or ethnic origins, their language, or their religious affiliation … Multiculturalism ensures that all [Canadians] can keep their identities, can take pride in their ancestry and have a sense of belonging. Acceptance gives Canadians a feeling of security and self-confidence, making them more open to, and accepting of, diverse cultures … Multiculturalism has led to higher rates of naturalization than ever before. With no pressure to assimilate and give up their culture, immigrants freely choose their new citizenship because they want to be Canadians.[95]

Recent legislative changes have made this rite of passage more difficult to secure, however.[96] It is within this context that the face-veiling ban in citizenship ceremonies, accentuated by the accompanying public declarations by government officials, was seen as part of a subtle yet persistent attempt to distinguish between inclusion for the majority of newcomers who willingly and "successfully demonstrate that they have internalized prevailing 'values' … [and exclusion for those immigrants who are] judged to have rejected liberal-democratic norms, through their deeds and/or speech."[97]

The Federal Court heard from the claimant that she conceived the "governmental policy regarding veils at citizenship oath ceremonies [a]s a personal attack on me, my identity as a Muslim woman and my religious beliefs."[98] In a well-publicized decision, the presiding judge accepted her claim and struck

[95] Citizenship and Immigration Canada, "Canadian Multiculturalism: An Inclusive Citizenship" (2012), available at www.cic.gc.ca/english/multiculturalism/citizenship.asp.

[96] In Canada, the transition from immigrant-to-citizen now incorporates tougher naturalization requirements, ranging from fulfilling a longer physical residency period prior to gaining eligibility to naturalize, to demonstrating an "intent to reside in Canada," to expanding the grounds on which dual citizenship can be revoked. See *Strengthening Canadian Citizenship Act*, *supra* note 94. Some of these legislative changes were later revoked.

[97] *See* Triadafilos Triadafilopoulos, *Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe*, 37 J. Ethn. Migr. Stud. 861 (2010), at 862. As Jason Kenney, former Minister of Citizenship and Immigration, put it: "Canadian citizenship is predicated on loyalty to this country." *See* Stewart Bell, *Jason Kenney Suggests New Legislation Is Need to Strip Citizenship of Dual Nationals Involved in Terrorism*, National Post, Feb. 6, 2013.

[98] Douglas Quan, *Woman Asks to Be Sworn as Citizen as soon as Possible after Overturn of Policy Requiring Her to Remove Niqab*, National Post, Feb. 11, 2015 (citing the claimant, Zunera Ishaq, a 29 year old Toronto resident who immigrated to Canada from Pakistan). The issue of expression of individual choice and "identity" has gained tremendous impact not only in scholarly circles, but also in recent judicial opinions. *See*, *e.g.*, *Obergefell v. Hodges*, 576 US (2015).

down the ban: "To the extent that the policy interferes with a citizenship judge's duty to allow candidates for citizenship the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath," wrote the Federal Court, "it is unlawful."[99] Although the case was determined on regulatory rather than constitutional grounds, the decision also took account of the gendered and exclusionary message such a ban carries with it: "The policy in this case could dissuade women who wear the *niqab* from even applying for citizenship. In such circumstances, a direct challenge to the policy is appropriate," read the decision.[100] This last point is important. The court rejected the government's argument that the applicant was not obligated to pursue Canadian citizenship; she could simply remain a permanent resident (or what scholars have termed a "denizen" who lacks political rights) ignoring the *in*equality that such a "solution" perpetuates when compared to gaining full membership – and its accompanying rights and protections – including political rights to participate in the democratic act of authoring the laws that collectively govern our public life.[101]

The Federal Court's decision was swiftly appealed by the government. At this moment, in the middle of an election year, the citizenship-oath *niqab* saga gained attention well beyond the courtroom, receiving ample domestic and international media coverage.[102] In a much-anticipated decision, the Federal Court of Appeal, like the Federal Court before it, ruled against the new policy on technical grounds; again, the decision did not engage the *Charter* rights at issue. As in response to the previous court ruling, various government officials continued to tout the value of the new (and by then, struck down) policy. The minister responsible for citizenship and immigration expressed the view that: "new citizens should recite the oath proudly, loudly and for everyone to see and hear." He also implied that the policy might be extended to *hijabs*.[103] The Prime Minister was quoted as saying: "when someone joins the Canadian family, there are times in our open, tolerant,

[99] *Ishaq v. Canada*, 2015 FC 156, para. 68. [100] *Id.*, para. 42.

[101] On the concept of denizen, *see* Thomas Hammar, Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration (Avebury: Aldershot, 1990).

[102] Douglas Quan, *'It's Classic Wedge Politics': Tories Continue to Tout Niqab Ban as Battle Heats Up in Court of Appeals*, National Post, July 14, 2015, available at http://news.nationalpost.com/news/canada/its-classic-wedge-politics-tories-continue-to-tout-niqab-ban-as-battle-heats-up-in-court-of-appeals; John Barber, *Veil Debate Becomes Big Issue in Canada Election, Putting Conservatives into Lead*, The Guardian, Oct. 1, 2015, available at www.theguardian.com/world/2015/oct/01/zunera-ishaq-veil-canada-election-conservatives.

[103] Quan, *supra* note 106.

pluralistic society that as part of our interactions with each other we reveal our identity through revealing our face."[104]

This articulation of the rationale for the ban represents the majority as generous and inclusive (hence the rhetorical power of the analogy between joining a family and one's new home society), while implicitly placing the "fault" for eroding such openness on those who are not willing to reveal their identity and their faces at the constitutive moment of *becoming* Canadian. This framing of the issue helps explain why analysts dubbed it a "wedge issue"; opinion polls showed ample popular support for the ban, while its detractors emphasized that "Canada defends the rights of minorities, we respect people's rights." A final twist in Ishaq's story was the government's request that the Federal Court of Appeal stay its ruling pending appeal, a legal move that would have had the immediate effect of barring Ishaq, the woman who challenged the face-covering ban, from obtaining citizenship and the franchise in time for the upcoming federal election.

WOMEN, CITIZENSHIP, AND THE FRANCHISE

Denying women access to the direct and reciprocal relationship of citizenship offends justice and democracy. It is particularly punishing for female members of minority communities who have historically been denied both membership and the franchise.[105] Threatening them with modern-day exclusion as they stand on the cusp of membership belittles their agency and makes them pawns in renewed state-religion struggles for power and recognition. Whatever the merits of such realignments, it is unfair to ask that they be borne disproportionately by those already marginalized and stigmatized. In Canada, it took a *niqab*-wearing immigrant, Zunera Ishaq, to challenge the government's ban, and to win her case. She was awarded the remedy she sought, namely, the opportunity to acquire citizenship by completing the naturalization process without having to compromise her religious practice. On the day of swearing-in, media crews arrived at the nondescript office building in which Ishaq's saga was about to reach its conclusion: members of her legal team and journalists from around the world video recorded her careful yet heartfelt recitation of the oath, with her face-veil on, in both official languages. A few

[104] Les Whittington, *Ottawa Wants Postponement of Ruling that Quashes Niqab Ban*, The Toronto Star, Sept. 18, 2015, available at www.thestar.com/news/canada/2015/09/18/ottawa-determined-to-continue-niqab-ban-at-citizenship-ceremonies.html.

[105] Juan de villa, Veils, Oaths, and Canadian Citizenship: Ishaq v. Canada, *The Court*, March 2, 2015.

tears were shed; hugs were exchanged. As a newly minted citizen, she even got to exercise her right to vote in the election in which her own case became a *cause célèbre*.

What is the broader message that can we draw from Ishaq's story? Everybody in the Canadian legal community knew, or should have known, that the ministerial ban stood on shaky ground in light of the long list of constitutional cases providing hefty protection to religious freedom in Canada. Yet, in the court of public opinion, one of the government's strongest points was the appeal to gender equality; forcefully claiming that allowing a veiled woman (perceived as a sign of submission) to take the citizenship oath, without openly interacting with her future fellow co-citizens, flew in the face of cherished Canadian values of gender equality.

In closing, it is important, then, to address majoritarian and emotionally-charged argument head-on. Recall that in *NS*, Justice Abella already established that it is not necessary to determine in the abstract "whether the niqab is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it ... These are complex issues about which reasonable people can and do strenuously disagree." At stake in the *Ishaq* controversy was the concretization of these abstract questions – returning to our introductory remarks, manner of fulfillment is raised to the same level as content: in a free and democratic society committed to multiculturalism, can a minority woman who has fulfilled all the requirements of naturalization (except the oath) be deprived of citizenship on account of the government's refusal to accommodate her religious belief which did not harm or restrict other people's ability to take the oath or acquire citizenship?

Recall, also, that the oath is performative and constitutive, giving vitality for both newcomers and the society that accepts them to the words that bind them together as co-members of a shared political community. The "trivialists" are thus mistaken in taking the oath lightly or wishing it away. At the same time, those adhering to the "distrusting" position are equally misguided, for they seek to predetermine who is an insider and who an outsider, and do so based of majoritarian fears and perceptions that betray the unique Canadian experiment of unity-in-diversity. What is more, if we truly care about women's empowerment and their ability to stand on their own feet, we *cannot* coherently uphold a governmental policy that, while purporting to assist minority women, actually leaves them without access to citizenship because of the (controversial or not) religious attire they wear in expression of sincere religious belief. This flies in the face of equality and relegates them to a state of dependence rather than the liberty and independence that should come with

acquiring full membership as equal citizens; these women are left, instead, in a twilight zone, without any direct link to the state, but only an attenuated relationship to it acquired through their spouses or other sponsoring family members. Canada's commitment to diversity and equality here must lead in tandem to a unified result: promoting, rather than inhibiting, women's access to the acquisition of full (formal, if not always substantive) membership, as equal citizens, with voting rights, with voice, with the potential and the ability to pursue change, whether legal or political, in their new home country as well as their own communities of faith. There are times when, instead of merely standing on the sidelines, it is imperative to take action. In taking the government to court, Ishaq openly and publically demonstrated her participation in and commitment to her adopted Canadian homeland and the quintessential values – diversity and equality – enshrined at its core.