

Ishaq v. Canada: faith, identity, citizenship.

FRANCESCA RAIMONDO

PhD Student

Alma Mater Studiorum - Università di Bologna

francesca.raimondo2@unibo.it

ABSTRACT

The debate surrounding issues of religion and identity in the Canadian context has been further fueled by the *Ishaq v. Canada* court case of 2015. The decision to reverse the ministerial ban on the *niqab* in citizenship ceremonies - which had been in place since 2011 - has sparked controversies of legal, political and social nature. This case sets the stage for a deeper reflection on the continuous, mutable, and often problematic relationship between religion and identity. In addition, it casts a light on the development of this relationship within the confines of a multicultural, deeply diverse society, struggling with issues of national identity in relation to religious difference. Equally thought-provoking is the role of the context in which the debate arises: the *Oath of Citizenship*, the official entrance of a new member into the “Canadian family”. The purpose of this paper is to analyse the relationship between religion and national identity in relation to this case, assessing whether and in what way Canadian identity is under stress and has been shifting, the role that these disputes play in relation to world religions, and their role within the process of identity construction.

KEYWORDS

1.
Canada - religion - *niqab*
- identity - citizenship
oath

Introduction

“It’s very important to stand up for your right. If you will not stand up for your right you will not get it” (Hopper, 2015). These were the first words pronounced by Zunera Ishaq on October 9 2015 in an Ontario judge’s office, after finally taking her oath of citizenship while wearing a *niqab*. Following a year and a half of legal battles, and two sentences which ruled the 2011 ban of full face-covering at citizenship ceremonies as unlawful, Ms Zunera Ishaq was eventually allowed to swear the oath wearing her *niqab*, and officially entered the “Canadian family”. The intense debate surrounding Ms Ishaq’s case - which rose to national attention - enabled her to become one of the most pivotal figures of the 2015 federal election campaign.

This case, and the discussion it triggered in both public and political arenas, addressed some crucial topics: freedom of religion, freedom of expression, religious symbols in the public sphere, the role of citizenship ceremonies,¹ gender equality and so on and so forth. All of these had already been scrutinized in the past by Canadian judges and had, in some cases, given rise to thoroughly innovative decisions.² This time, however, these issues had a slightly different connotation, due to the peculiar features of the case. Because the trial concerned the Oath of Citizenship³ - the very precise moment that symbolises the entrance of a new citizen in the national community - it renewed attention towards the problematic relationship between religion and identity, thus shedding new light on the ways in which such a relationship could be declined in a multicultural society like the Canadian one.

This essay will proceed as follows: drawing on how the term “identity” was used in the Ishaq’s case, part one briefly examines the so-called *Era of Identity Politics*, including its role in the Canadian context. The focus will be on religious identity. Part two is dedicated to Ms. Ishaq’s legal case, with particular emphasis on the relationship between religion and personal identity. More specifically, I will analyse the limits and challenges of citizenship in multicultural Canada, when a religious symbol is considered a feature of identity. Firstly, is the *niqab* a defining element of one’s identity, or is it merely a personal choice? How should the compromise measures proposed by the Government be considered? Is wearing the *niqab* a contradiction to seeking citizenship in a Western country? This essay will close with a brief reflection on the consequences of examining an individual’s faith through the lenses of personal identity, focusing on the challenges originated by certain religious symbols of modern Canadian society. Lastly, I will examine the potentially unifying role that citizenship could play on the matter.

1. *The Identity Politics Era and the Canadian Context*

1.1. “Not the way we do things here.” *Identity References in Ishaq.*

There were three key events at the core of the Ishaq case in which references to “identity” were considered. In some instances, the term was used to define national identity, by delimitating what it means to *be Canadian*. In other cases, identity was directly linked to religion, and to the importance that certain acts and symbols have for the believer.

Firstly, on December 12, 2011, the Federal Government introduced the *Operational Bulletin 359*,⁴ which stipulated that candidates must be visible when taking the oath at the citizenship ceremony. In other words, this bulletin banned all full-face coverings. Shortly thereafter, this measure was incorporated into s. 6.5 of the CIC Policy manual *CP 15: Guide to Citizenship Ceremonies*. Jason Kenney, Minister of Immigration and Citizenship at the time, introduced the policy by declaring: “[T]his is not simply a practical measure. It is a matter of deep principle that goes to the heart of our *identity* and our values of openness and equality. The citizenship oath is a quintessentially public act. It is a public declaration that you are joining the Canadian family and it must be taken *freely and openly*” (National Post, 2011).

Secondly, religious identity was an essential element in the defence of Ms. Ishaq, who, in early 2014, challenged *Operational Bulletin 359* in front of the Federal Court. The objective of her legal battle was to affirm her right to wear her *niqab* during the citizenship ceremony. She stated that “the governmental policy regarding veils at citizenship oath ceremonies is a personal attack on me, my *identity* as Muslim woman and my religious beliefs.”⁵

Finally, after the Federal Court ruled that the governmental policy was unlawful, former Prime Minister Stephen Harper expressed his criticism towards this decision. He stated: “I believe, and I think most Canadians believe that it is offensive that someone would hide their *identity* at the very moment where they are committing to join the Canadian family. This is a society that is transparent, open, and where people are equal”, thus claiming that covering the face during the oath “is not the way we do things here” (Lowrie, 2015). This last sentence became viral, because it was the slogan used by Minister for Immigration and Citizenship - Chris Alexander - to launch an on-line petition to support the position of the Government, who had already decided to challenge the decision in front of the Federal Court of Appeal.

The above references to *identity* are valuable for two reasons. First of all, we can note that practices which used to be described in terms of religion, ethnicity or culture, are now considered to be rooted in personal identity. This is more evident when the individual - in this case Ms. Ishaq - referred to a legal measure as capable of having an impact on his/her perception of personal identity.

Furthermore, these events show how public institutions tend to favour the dominant group, supporting their decisions by stating that, while Western society bears liberal values, immigrants bear *cultures* (with a negative connotation). In Leti Volpp’s words: “[T]he citizen is assumed to be modern and motivated by reason; the *cultural other* is assumed to be traditional and motivated by culture.” Consequently, “in order to be assimilated into citizenship, the *cultural other* needs to shed his excessive and archaic *culture*” (Volpp, 2007, p. 574) because the culture’s bonds appear to be in contradiction with the new citizenship. Leti Volpp continues: “[D]iscourses of citizenship tend to be characterized by the belief that minorities’ rights are derived from and vested in the enabling power of liberalism, which position the *non-ethnic* as autonomous, rational and self-sufficient individual, in contrast to the disorderly, irrational, culturally motivated *other*” (Volpp, 2007, p. 576-577). These beliefs were echoed

by Prime Minister Harper's discourse, when he stated that the *niqab* opposed Canadian values, as it is rooted within an *anti-feminist* culture.

1.2. *The Era of Identity Politics*

The last thirty years have been defined as the *Era of Identity Politics*, due to the wide mobilization and politicization of some social group based on elements of identity: ethnicity, race, language, gender and religion (Eisenberg, 2013). This focus on the concept of *identity* and its features find consolidation in Constitutions, International Conventions and Statutes. This phenomenon spread to Canada in 1982, which saw the enactment of the *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter*) to broaden constitutional protection in order to encompass legal and political rights; features that are related to personal and group identities.

The *Charter* enshrined all of the elements that are constitutive of Canadian identity, such as official bilingualism⁶ (connected to the peculiar relationship between Québec and RoC and the myth of the "two founding people")⁷, the Aboriginal peoples, whose rights were only fully recognized in 1982,⁸ multiculturalism, absolute equality between provinces, and the central role played by the national institutions (McRoberts, 1992). In addition to the role that the *Charter* played in conceptualizing and developing an approach related to different perceptions of *identity*, two other entities have an essential part in defining what 'Canadian' means: the *Multiculturalism Act* of 1988 and the effect of the growing presence of non-Christian believers on religious identity (Beaman, 2011).

What is remarkable in the era of *Identity Politics* is the emergence of new claims within the public sphere that are connected to peculiar features of identity: sexual orientation, disability, issues connected to recent immigration, and newly settled immigrant groups. Moreover, the diffusion of Islamic practices in Western countries, such as religious arbitration and veiling, fosters greater awareness of issues related to identity by public institutions (Eisenberg, 2009, p. 2).

In broader terms, it should be highlighted that the claims for recognition and adjustment regarding certain aspects of identity are made not only as a legal requirement, but also in order to respect the democratic values celebrated by contemporary nation-states (Eisenberg, 2013, p. 612).

Scholars have asserted that an identity-centered approach does have specific positive characteristics, such as promoting greater respect for the *other*, and allowing us to discover the ways through which social exclusions and prejudices towards certain groups are enabled. On the other hand, however, other works have shed light on the inherent risks of *identity politics*. Empirical literature, in particular, emerging from the disciplines such as sociology, anthropology, and political sciences, analysed the risks associated with the political mobilization of identity groups: reinforcing the elites within minorities'

groups and thus entrenching hierarchies within the group itself (intra-group level), risk of co-optation (inter-group level) and essentialism.⁹ Another common critique of *identity politics* is that it could undermine democratic features of society for two reasons. Firstly, it would encourage people to identify and polarize themselves on the basis of what distinguishes them rather than what unites them. Secondly, given that identity features are presented as monolithic and non-negotiable, they will not facilitate democratic debate and dialogue (Eisenberg and Kymlicka, 2011).

1.3. *Religious Identity in the Canadian Context*

In the *Era of Identity Politics*, numerous controversies over religion and religious identity have emerged within the Canadian context. Framing religion in terms of identity is connected both to the rise of identity politics in the last thirty years, and to what has been identified as the *secularization of religious freedom* (Moon, 2008, p. 217). This section aims to analyse religion and religious freedom in relation to the concepts of *choice* and *identity*, examining the consequences of their distinction both for the individual and the State, and the role these elements play in the Canadian context.

Richard Moon stated that the “public justification for religious freedom is now framed in more *secular terms*” (Moon, 2008, p. 217). Thus, while religion previously represented the way through which the individual could discover spiritual truth, religious beliefs are now based on individual choice (an expression of individual autonomy), as well as cultural identity. The shift to *identity* is partial and relatively recent, and it speculates that religion deserves respect and protection, as it is deeply rooted in the believer’s identity and connects them to the community of believers.

This transition is the result of what Moon identifies as the *secularization of religious freedom*. Moreover, the transition from the idea of religion as an expression of autonomous choice to an element of personal identity seems to be tied to the aim of being more inclusive in the protection of a wider number of faiths. In particular, this implies the need to protect those faiths in which the relevance of religious authorities and the centrality of the community in the religious life are greater than the personal commitment of the believer, a key element in other doctrines like Protestantism.¹⁰ Another reason for the transition is based on the widespread scepticism and the secular culture of contemporary nation-states that view religion as a matter of faith or, more negatively, as irrational (Moon, 2008, p. 218). Therefore, religion is more likely to be considered part of a person’s cultural identity, rather than a rational choice.

However, the identity approach is not unproblematic, especially from the State’s perspective. The distinction between choice and identity could appear negligible to the believer considering that, in his view, religion constitutes a choice *and* a fundamental element of his identity.¹¹ This is emblematic in the majority of cases concerning the Islamic headscarf and in Ishaq’s case as well, because the women concerned usually refer to the veil both as a constitutive element of their faith and religious identity,

and as a personal choice. The reference to choice is important, as it stresses that women are not forced to wear a veil to satisfy their husband's or family's desires. Conversely, it is of the utmost importance for public institutions to assess if religion, or religious practice, represents a choice of the believer or a feature of identity. In fact, if religion is considered a choice, the obligations of the State are less strict because the believer himself has to bear the burden of his choice, and must comply with the obligation to respect the rights and legitimate interests of others. On the contrary, when religions are viewed as a feature of each individual's identity, it is crucial for the State to show equal recognition for all of them. Therefore, while the State has to respect practices based on identity, it does not have to base its actions on the religious values of a certain group of citizens, or on principles that a religious group considers immoral or wrongful (Moon, 2008, p. 218).

The shift from *religion as choice* to *religion as identity*, also characterizes the Canadian system and is reflected in the case concerning s.2(a) of the *Charter*.¹² It is therefore necessary to briefly discuss some of the consequences of this shift, bearing in mind that numerous ambiguities and uncertainties can arise. Thus, this transition is not complete, nor indisputable (Eisenberg, 2014).¹³

One of the main consequences is that the identity approach brings to light exclusions and injustices historically perpetrated toward certain groups. As noted by Eisenberg, those who rely on a theoretical approach that is grounded in identity are "more inclined to treat certain features of a group's religion, such as a particular practice or commitment, as an immutable part of group's identity and therefore significant to what is required to treat a group respectfully" (Eisenberg, 2014, p.5). Consequently, the limitations or restrictions imposed on a certain practice could be perceived as discriminating against an entire group. If religious practice is considered a choice, then it can become a burden placed on the individual. Conversely, the identity approach removes the focus that is placed on the individual, and brings to light the injustice directed towards the group. Ms. Ishaq particularly stressed this point in her defence, affirming that the measure introduced by the Canadian government could dissuade women who wear the *niqab* to even apply for citizenship.¹⁴ Finally, the identity approach could push the State to make concessions to certain religious practices, given that its unjustified limitations could be perceived as an exclusionary tactic directed toward an entire group.

Furthermore, it must be noted that, although s. 2(a) of the *Charter* grants freedom of both conscience and religion, greater attention has been placed on freedom of religion compared to non-religious beliefs, such as political ideas. Moon notes that, if *autonomy* is the core value of s. 2(a), then it should grant equal protection to religious and non-religious beliefs and practices. Nevertheless, religion continues to be at the centre of the s. 2(a) cases, due to the impact that this value can have on everyone's life. Moon proceeds to highlight the simultaneously threatening and vulnerable character of religion (Moon, 2008, 219). Threatening because religion involves practices that can be imposed on others without public justification, and vulnerable because it often lies outside the scope of public concern, and could be overridden by secular powers. Finally, the Courts have often established that the State breaches s. 2(a) not only when taking coercive measures in relation to religion (restriction or obligation to follow religious practices), but also when it supports or favours a certain creed, as this

implies that those who do not adhere to a specific faith are not fully part of the community. This is particularly evident when a religious symbol is displayed in State institutions such as Parliament, schools and hospitals, or when a religious practice is carried out in an institutional context (prayers in public schools or at the beginning of municipal council session),¹⁵ or when a non-mainstream religious practice or symbol is limited or banned (be it explicitly or through a so-called “neutral” rule, like in Ishaq’s case). These types of decisions have a particular significance, most notably, when they occur in a society like Canada, where pluralism is considered to be a core value.¹⁶ Therefore, we must ask ourselves: what is religion’s role within the multicultural Canadian context?

Peter Beyer (2008, p. 9) offers a suggestive starting point: the national anthem. There is a line in the English version of *O Canada* that says “*from far and wide*”: this clearly demonstrates that Canadian citizens have varied ethno-cultural backgrounds. These words do not appear in previous versions of the hymn, but were included in 1968. In the same year, a direct reference to religion was also added: “*God keep our land*” before “*glorious and free.*” Both of these additions were officially adopted in 1980. In summary, the national anthem openly mentions two distinctive elements that are inextricably linked to the Canadian context: diversity and religion.¹⁷

During this period, the Government promulgated numerous acts with the aim of shaping the country into an independent nation-state, as opposed to a British colony; i.e. the adoption of the current flag that no longer includes any British symbols, the Patriation of the *British North American Act 1867*, official bilingualism, multiculturalism, the implementation of an immigration policy based on abilities that eliminated all national, religious, racial, ethnic criteria, and so on. These changes have collectively contributed to building a unique national identity, whose central and highly symbolic element is definitively multiculturalism. In Peter Beyer’s words: “Canada [...] was articulating its official identity as an entirely independent country dedicated to the promotion and incorporation of cultural diversity, linguistic duality, and somewhat less explicitly, religious pluralism” (Beyer, 2008, p. 10). Although implicitly, religion plays a significant role. Moreover, the ethnic pluralism favoured by the immigration policies opened doors to a notable number of faiths. The first immigrants were Christian because the immigration policies - based on national, racial, ethnic and religious criteria - favoured people coming from the British Isles and Europe.¹⁸ After the elimination of these criteria, and with the introduction of immigrant selection standards based on skills, there was a rise in the number of different faiths, which went from 32 in 1911 to 124 in 2001 (Beyer, 2008, p. 15).

Religion has played a key role in shaping Canadian national identity since the arrival of the first settlers. That period was characterized by harsh religious coercions - forced conversions of Aboriginal people, *residential schools* - and by moments of pragmatic tolerance, such as the *Treaty of Paris, 1763*. This treaty ended the Seven Years’ War between Britain and France, and the British Government allowed the practice of the Catholic faith in the colony. This tolerant approach was confirmed in the *Québec Act of 1774*, where the British Parliament allowed the colony’s inhabitants the right to maintain their Roman Catholic faith, along with the French language and the civil law system (Moon, 2014, p. 2). In doing so, Britain wanted to ensure the stability of Québec at a time of revolutionary uprising in the nearby

American colonies. Since then, the State-Church bond was particularly tight, due to the regular intervention of the Church in matters of social services and in framing public morality. Therefore, Canada was a primarily Christian country, with an internal division between French-Canadian Catholics and British-Protestants which lasted until the second half of the twentieth century. In Richard Moon's words: "the political accommodation between Roman Catholic and Protestant communities, while always imperfect and precarious, shaped the new country's response to the growth of religious plurality" (Moon, 2014, p. 5-6). In the aftermath of WWII there was a gradual reduction of the presence of Christian morality in civil society, as well as an increasing demand for greater neutrality of government institutions and a reduction of faith-based discourse in the legislature (especially in Québec). At the same time, there was a significant increase in the number of alternative faiths on the Canadian soil, due to immigration. This ethnic and religious pluralism led to a peculiar form of neutrality that did not entail the exclusion of religion from public life, since multicultural policies - which encourage the preservation of cultural and religious values and ties - can only coexist and favour the presence of religion in both social debates and in public spaces.

Although identity politics spread globally, it found a particularly fertile ground in Canada, due to the country's history. As Avigail Eisenberg said: "[I]dentity politics is, after all, neither a new nor a transient kind of politics in Canada; rather, it is woven into the very political fabric of the country and its history of settlement and dispossession, nation building, federalism, immigration and religious pluralism" (Eisenberg, 2013, p. 628).

2. Ishaq v. Canada. Religious Identity at the Test of the Oath of Citizenship.

Ishaq's case provides us with a chance to reflect on the concept of identity, with a particular focus on examining how religious identity unfolds and is eventually limited in a multicultural context.

Ms. Zunera Ishaq, a Pakistani national and devout Sunni Muslim, moved to Canada in 2008. On October 25 of that year, she became a *permanent resident* after having undertaken the long and tortuous path to naturalization. Her application for citizenship was approved by a judge on December 30, 2013. She was granted citizenship three days later under subsection 5(1) of the *Citizenship Act 1985*. However, under paragraph 3(1)(c) of the *Citizenship Act 1985*, a person is not considered a Canadian citizen until he/she takes the Oath of Citizenship.

As previously stated, Ms. Ishaq is a devout Sunni Muslim, who voluntarily follows the Hanafi school of thought and observes the religious practice of wearing a *niqab* (a veil that covers the entire face except for a slit at eye level) in public. However, pursuant to the rule introduced in 2011 by the Minister of Citizenship and Immigration, the oath of citizenship must be taken without a face covering.¹⁹ Specifically, under s. 13.2 of the *Guide to Citizenship Ceremonies*, on the day of the *Citizenship Test*, the candidates must be identifiable, meaning they are thus required to swear with their face uncovered. Two refusals to comply with this obligation would terminate the application for citizenship. Ms. Ishaq did not refuse to show her face for identification and security purposes on the day of her citizenship

test or on previous occasions.²⁰ Nevertheless, the policy introduced in 2011 would have forced her to show her face at a public ceremony - the Oath of Citizenship - which is not aimed at identification nor granting public security. She initially requested that her citizenship ceremony be rescheduled, but then filed an application in front of the Federal Court, seeking a declaration that the policy breached ss. 2(a)²¹ and 15(1)²² of the *Charter*, and was unlawful on administrative grounds.

Judge Keith Boswell, of the Federal Court, accepted the application and declared the contested measure to be unlawful, because it limited the discretion of the *citizenship judge* (the public official in officiating the ceremony).²³ Section 17(1)(b) of the *Citizenship Regulations*²⁴ required a citizenship judge to conduct the ceremony “allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof” (e.g. swearing on the Holy book). “‘Religious solemnization’ is not just about the mere act of taking the oath itself [...] [R]ather it extends also to how the oath is administered and the circumstances in which candidates are required to take it.”²⁵ Therefore, “[H]ow can a citizenship judge afford the greatest possible freedom in respect of the religious solemnization or solemn affirmation in taking the oath if the Policy requires candidates to violate or renounce a basic tenet of their religion?”²⁶ Moreover, the Federal Court stressed that the regulations of the citizenship oath did not require any visual confirmation that the oath was said aloud.

Although Ms. Ishaq’s application was accepted, the ruling made no reference to the *Charter*. Judge Boswell declared that examining the applicant’s *Charter* submission was unnecessary, given that the contested measure was declared unlawful on administrative grounds. The case highlighted a contrast between two rules: section 6.5 of the CIC Policy manual, *CP 15: Guide to Citizenship Ceremonies* - establishing that the face had to be uncovered during the oath-taking portion of the ceremony - and section 17(1)(b) of the *Citizenship Regulations*, requiring the citizenship judge to allow the greatest possible freedom in the religious solemnization or the solemn affirmation during the oath. It was therefore necessary to determine which regulation was to prevail on the other. The general rule states that subordinate legislation cannot conflict with its parent legislation. In Ishaq’s case, the conflict was between *Guide* and *Regulations*, both subordinate to the *Citizenship Act*. However, “regulations enacted by the Governor in Council generally have a higher status than guidelines and policies.”²⁷ Hence, considering the hierarchy of sources, the mandatory duty of the judge under s. 17(1)(b) of the *Regulations* could not be overcome by the measure introduced by the *Operational Bulletin 359*, then incorporated in s. 6.5 of the *Guide*.

The Government decided to appeal the ruling. On April 10, Judge Webb, of the Federal Court of Appeal, imposed a suspension on Judge Boswell’s ruling until the Federal Court of Appeal reached its final resolution on the case. The reason for Webb’s decision was that, without halting the decision process, Ms. Ishaq could have taken her oath of citizenship even before a ruling from the Court of Appeal had been reached. Therefore, if Judge Webb had decided not to grant the stay, the Court of Appeal’s decision would have been inconsequential anyway, given that the oath had already been taken.²⁸ Thus, Ms. Ishaq could not take the oath of citizenship before the Federal Court of Appeal had released its judgement. In the last part of the three-stage test - set out by the Supreme Court of Canada in *RJR-*

*MacDonald Inc. v. Canada*²⁹ to determine whether Boswell's judgment should be confirmed - Judge Webb took into consideration the harm that would have come in delaying the citizenship process. For instance, it was stressed that Ms Ishaq would not have the right to vote. Webb agreed that this constituted *irreparable harm*, however he decided that the appeal could proceed on an expedited basis.³⁰

Therefore, on September 15, 2015 the case was heard before Judges Trudel, Webb and Gleason, and the judgement was rendered from the bench on the same day to allow Ms. Ishaq to participate in the federal election on October 19, 2015.³¹ In a six-paragraph judgement, the Federal Court of Appeal upheld the decision made by Judge Boswell, specifically stating: "[W]hile we do not necessarily agree with all the reasons given by the Federal Court, we see no basis to interfere with the Federal Court's finding as to the mandatory nature of the impugned change in policy as this finding is overwhelmingly supported by the evidence. It follows that this appeal must be dismissed."³² Moreover, the Court refused to consider the *Charter's* issues, because they were held to be unnecessary for the disposition of this case,³³ and because the record was relatively scant with respect to those issues.³⁴

However, both decisions seemed to diverge from Ms. Ishaq's original defence, as well as from the political and civic debates they triggered, which focused on the limits of religious freedom, the role of citizenship and the values upheld by Canadian society. After the Federal Court of Appeal dismissed the motion for a stay proposed by the Minister of Citizenship and Immigration,³⁵ on October 9 Ms. Ishaq took the Oath of Citizenship while wearing her *niqab*, and then declared that she was going to vote in the upcoming federal election.

On November 16, three days after the terrorist attacks in Paris, the newly elected Liberal Government - chaired by Prime Minister Justin Trudeau - formally withdrew the appeal request to the Supreme Court on the *niqab* case. John McCallum, Minister of Immigration, Refugees and Citizenship, and Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, released a statement in which they asserted the will of the Government to not seek further appeal to the Supreme Court of Canada. Moreover, they declared: "Canada's diversity is among its greatest strengths, and today we have ensured that successful citizenship candidates continue to be included in the Canadian family. *We are strong and united country because of, not in spite of, our differences.*"³⁶

2.1. *Niqab: identity or choice?*

In paragraph 1.3 this article examined the roles that *identity* and *choice* play in relation to religion and religious freedom, and which are the consequences of referring to one of their interpretation or the other. This section analyses the relevance of *identity* and *choice* in the Ishaq case. We will discuss the possible consequences of defining the *niqab* in terms of identity or in terms of choice. The main argument is that the measure introduced in 2011 appeared to be potentially discriminatory, regardless of considering the *niqab* as part of a person's identity or a choice of the believer.

Ms. Ishaq affirmed that the obligation to show her face during the oath of citizenship was a personal attack on her *identity* as a Muslim. The Government claimed that “wearing the *niqab* is just a personal choice, not a *basic sacrament*”, adding that “citizenship is a *privilege*, not a right. If the Applicant is opposed to baring her face, then [...] she should just accept the consequences of not becoming a citizen.”³⁷ It should be noted that Ms. Ishaq mentioned her Muslim *identity* while talking about the government’s policy on veils at the citizenship ceremonies, but she did not make any reference to *choice*. Nevertheless, if taking into consideration the wording used in her arguments,³⁸ and the interviews she gave to Canadian newspapers,³⁹ one can assume that she considers the *niqab* to be a *personal choice* as well.

We do not know for certain that Ms. Ishaq intentionally focused on “*niqab as identity*”, rather than on “*niqab as choice*”, to strengthen her arguments. However, it is emblematic that she focused on the *identity* aspect, whereas the government chose to focus on the idea of *personal choice*. As previously noted, public institutions should manifest greater respect for *identity’s* features than for a person’s choice. In fact, if a State limits or bans specific *identity* practices, it sends the message that a group is not considered fully a part of the community. On the contrary, a person’s *choice* must comply with the social obligation to respect the rights and the legitimate interests of others.

To begin with, Ishaq’s case clearly shows one of the aforementioned positive aspects of using an approach based on *identity*: highlight the discrimination perpetrated against certain groups. Even though written in neutral terms, the measure introduced in 2011 specifically targeted fully-veiled women. The decision made by the Government to play down the importance of a given religious practice or to ban it, while allowing other religious practices to exist in public spaces, is likely to give rise to an unequal treatment in respect to certain ethnic and religious groups. The Government is implicitly sending the message that some citizens - or those who aspire to become citizens, such as Ishaq - are unequal.⁴⁰ Furthermore, the Government considered the *niqab* to be a sort of frivolity: “it is unclear why a citizenship ceremony, which happens once in a lifetime, is not one of those rare instances where it is absolutely necessary for the Applicant to remove her *niqab*.”⁴¹ Hence, the woman is doubly stigmatized for her faith.

Secondly, it is undeniable that the *niqab* also constitutes a choice, and it is well-known that the Muslim community is divided over its use.⁴² However, this division does not justify a complete ban, nor does it lessen its value within the Muslim community. Since its earliest decisions concerning religious freedom, the Supreme Court of Canada has stressed the centrality of the individual’s conscience in matters of faith. In the renowned *Amselem* case, the Supreme Court referred to the subjective understanding of freedom of religion.⁴³ Therefore, the claimant invoking freedom of religion does not have to prove the objective validity of his belief, or the compliance with official religious dogma or with his church’s position; he must only demonstrate the *sincerity* of his beliefs.⁴⁴ While a court is not qualified to determine the content of the subjective understanding of religion, it is qualified to inquire into the authenticity of a claimant’s belief. In Judge Iacobucci’s words: “[the] State is in no position to be, nor should it become, the arbiter of religious dogma.”⁴⁵

Furthermore, the Government pointed out that, in other similar official circumstances, Ms. Ishaq did not wear the *niqab*. In doing so, the Government's aim was to lessen her religious conviction. Nonetheless, the compliance with the obligation to wear a *niqab* was misleading and of little relevance. Ms. Ishaq had unveiled herself in the past when it was absolutely necessary for identification and security purposes. To this accusation of a supposed inconsistency in complying with religious tenets, the Supreme Court of Canada in *Amselem* case replied: "[B]ecause of the vacillating nature of religious belief, a court's inquiry into sincerity [...] should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom."⁴⁶

In addition, considering the *niqab* uniquely as a choice of the woman bears some potential risks. As pointed out by Avigail Eisenberg, certain situations and rules are likely to create tension between the choice of an individual - e.g. adhere to a given faith or follow its practices - and his *democratic inclusion* in the society (Eisenberg, 2014). In Ishaq's case, democratic inclusion bears additional significance, since citizenship itself represents the full entrance into a community with rights and duties. This case is emblematic of this tension, because Ms. Ishaq found herself facing a dilemma:⁴⁷ becoming a Canadian citizen with full rights and duties, or respecting the sincerely believed tenet of her religion and wear the *niqab*. Whatever her choice, she would be forced to compromise. Furthermore, the effects of this choice would be harmful not only for Ms. Ishaq, but also for other Muslim women that wear the *niqab*,⁴⁸ and generally towards the entire Muslim community (Litwin, 2015). Therefore, the consequences of this compromise would prevent Muslim women to effectively integrate into society, potentially engendering a form of exclusion from their new community. The abovementioned dilemma also appears to be irreconcilable with the purposes of multiculturalism and reasonable accommodation. The latter, even with its limitations that will be analysed in the following paragraph, seeks to foster the inclusion of minorities and newly settled immigrant groups into their new communities. In the words of Loprieno and Gambino (2008, p. 235), the recognition of diversity in society would create conditions for harmonious integration in the medium and long term, although in the short term it would appear as exacerbating the differences and stigmatizing certain behaviours.

2.2. Reasonable Accommodation and Risks for Minorities

The Government proposed an arrangement to Ms. Ishaq: she could either sit in the front or the back row at the ceremony, to prevent the other participants from seeing her face once her veil had been removed,⁴⁹ and she would be sitting next to another woman. The proposed arrangements sought to reduce the burden of the measure introduced in 2011. However, Ms. Ishaq rejected them because they would not prevent her from potentially being seen by men (citizenship judge, officials), or from being photographed. In relation to the government's proposal it seems therefore necessary to briefly examine the principle of reasonable accommodation and, in particular, its risks and shortcomings. On closer inspection, the Government's proposal could not be considered a reasonable accommodation *strictu sensu*, because Ms. Ishaq was requested to renounce to the *niqab* in any case. Notwithstanding, some reflections on reasonable accommodation seem to be highly relevant even in this case.

The principle of reasonable accommodation was first adopted in Canada by employment law, with the aim to respond to requests of flexibility made by the employees with regards to their religious practices (Beaman, 2013). The aim of reasonable accommodation is to provide a neutral rule to avoid producing an *adverse effect*. This means there is an obligation to adapt rules and practices, by taking into account the needs of the discriminated individuals (on the basis of religion, ethnicity, gender, nationality, and so on and so forth) provided that the accommodation does not cause undue hardship.

Scholars have pointed out some criticism to this principle. Lori G. Beaman notes that the term “reasonable accommodation” could already be problematic. First, the word *accommodation* suggests a dichotomy between *us* and *them*. In addition, it refers to the categories of majority and minority, but “in a manner that does not address the protection of religious minorities” (Beaman, 2011, p. 253). In the same way, the word *reasonable* evokes *common sense* which, in a predominantly Christian society, would be measured in relation to Christianity, leaving aside other creeds and indirectly belittling them. In the case of *Ishaq v. Canada*, if, on one hand, the Government banned the full veil from the oath taking part of citizenship ceremonies, on the other hand, section 17(1)(b) of the *Citizenship Regulations*⁵⁰ required the citizenship judge to allow “the greatest possible freedom in the religious solemnization or the solemn affirmation thereof.” The *Citizenship Regulations* also allow the possibility of swearing on the Holy Book, a traditional practice among Christians. As this can be considered *common sense*, it would have been possible for Ms. Ishaq to swear the oath on the Qur’an. However, she was prevented to take part at the ceremony with the *niqab*, even though it is possible to assume that both Qur’an and *niqab* hold the same symbolic religious value for the believer.

Finally, Benjamin Berger observes that there is a sort of *cross-cultural encounter* between law and religion, given that law itself is a cultural system characterized by symbols, categories of thought and specific practices. The use of tolerance and accommodation reduces issues to a merely technical process, where law takes on a *managerial role* through which it “tolerates that which is different only so long as it is not so *different* that it challenges the organizing norms, commitments, practices and symbols of the Canadian constitutional rule of law” (Berger, 2008, p. 259). Consequently, it could be said that the Government considered the *niqab* to be so *different* that it could not be reconciled with the entrance of a new citizen into the national community.⁵¹ The Government saw the *niqab* not as a symbol of religious freedom, diversity and pluralism, but as the image of a repressive culture, inherently incompatible with Canadian values (Moon, 2015).

2.3. *Niqab vs. Citizenship*

The official goal of the measure introduced in 2011 was to ensure that candidates be completely visible when taking the oath of citizenship. However, a visual confirmation that the oath has been said aloud was unnecessary and not legally required. Indeed, the only proof that a candidate had sworn the oath of citizenship was the new citizen’s signature beneath the written oath or affirmation of citizenship form.⁵² It is also important to stress that an effective *visual confirmation* would be arduous to provide,

because seeing the face of the candidate does not assure that a person is effectively swearing the oath. As underlined by Ms. Ishaq, there was no logical connection between ensuring that the oath was taken and visual inspection, since such method could only confirm that the participants' mouths were moving; "*citizenship officials are not lip readers.*"⁵³ Moreover, Judge Boswell provided an explanation as to how the measure could lead to an illogical effect: "a refusal to remove a face covering, therefore, precludes receipt of a citizenship certificate and will deny that person citizenship, *even if the officials are confident that the person actually took the oath by hearing it recited.*"⁵⁴

The language of the measure and, above all, the public statements made by Minister Kenney, and the internal correspondence among officials of the Department of Immigration and Citizenship, clearly demonstrate that the removal of face covering at the oath of citizenship ceremony was mandatory. Hence, it would have had potentially discriminatory consequences on Muslim women that wear full-face veils. This is in sharp contrast with the so-called *Canadian conception of equal religious citizenship*, according to which "religious freedom and religious equality rights are allied in advancing the right of religious persons to participate equally in Canadian society without abandoning the tenets of their faiths" (Ryder, 2008, p. 87). Consequently, individuals should not be asked to choose between faith and access to citizenship, with its rights and duties. That is even truer if we consider religion and faith to be basic features of identity that pervade all aspects of everyday life, and cannot be confined to the private sphere.

It can be argued that, on one hand, the State has an obligation to protect and to encourage one's freedom to practice their faith (in addition to inner belief), and to therefore also carry out those practices that have a public dimension, though taking into consideration the limits posed by rights of others. Nevertheless, wearing the *niqab* does not endanger the rights of other members of society, nor does it clash with the promotion of pluralism and multicultural Canadian citizenship.

It has been argued that the measure introduced by the Government promotes gender equality, but this argument is weak for several reasons. The choice to wear a veil is made for a variety of reasons, it can be a manifestation of faith, an assertion of one's identity, an expression of cultural traditions, or a protest.⁵⁵ Therefore, as provocatively stated by Judge Tulkens in her statement on *Sahin v. Turkey*, if the State considers the veil to be in contradiction with gender equality, then it should ensure that wearing it is also prohibited in private.⁵⁶ However, it is clear that any ban on wearing the veil would not favour the emancipation of women. On the contrary, it would limit their ability to participate actively in society even more. Finally, each ban or obligation on women's attire inevitably sounds paternalistic.⁵⁷

Symbols seems to play a key role in the Ishaq's case: *niqab*, *citizenship*⁵⁸ and *oath* are all symbolic, but in the opinion of the Government, these symbols are incompatible with one another. Nevertheless, preventing a citizenship candidate from wearing a symbol of his/her faith during the oath of citizenship - the very precise moment when citizenship is symbolically given - would lead to a potential violation of freedom of religion and expression. In addition, it would also convey the message that some people are less worthy than others to become citizens, unless they are willing to give up a part of their identity.⁵⁹

Conclusion

Ishaq's case is perfectly representative of the *identity politics* era. It shows the positive consequences of reading the individual's faith through the lens of identity. It casts a light on how a given measure can lead to injustice and discrimination towards an individual and a group. As mentioned previously, marginalization does not only affect individuals, but could also damage an entire group. If a practice is considered an individual choice, the person in question will have to bear the burden of this choice, whereas if the practice is understood to be a feature of one's identity, its limitation or exclusion could be perceived as a discrimination against the group as a whole.

This case seems to highlight a change of direction in the Canadian context: slightly amending the path to citizenship in an exclusionary sense, placing symbolic restrictions on it. Therefore, while on the one hand rights pertaining uniquely to citizens are very few (mainly, the right to vote), and distinctions based on the status of a citizen are rare, on the other hand, some State-led initiatives seem to stress the fact that "being Canadian" is strictly connected to certain values and traditions. Consequently, the accommodation of those religious practices that appear to undermine the Canadian identity would be a risk (Eisenberg, 2014, p. 12), and this would also undermine the full recognition of some groups as part of society.

In full compliance with the recognition of the identity of each member, public institutions should be obliged not to consider certain symbols as incompatible with the law. What is more, these symbols provide the chance to learn more about other cultures, helping to build a multicultural society that respects pluralism and promotes diversity.

Ishaq's case is of particular interest to scholars because it happened in Canada, the first country to constitutionalise multiculturalism. It showed that nowadays a multicultural policy - introduced in Canada in 1971 with the aim of "promoting polyethnicity rather than assimilation for immigrants" (Kymlicka, 1995, p. 17) - is under pressure, particularly when it comes to certain traditions and religions. Therefore a greater effort is required, compared with few decades ago, when Canada was experiencing migration mainly from Christian Europe.

The circumstances of the case are worthy of attention, since the citizenship ceremony is the fundamental moment for an immigrant to show willingness to join the hosting community. Although the status of a citizen is a defining criterion of equality in society, *Ishaq v. Canada* shows how equality remains a goal to achieve fully. Today, more than ever, citizenship must return to its original spirit of equality, which, in Canada, appears to be closely connected with the *preservation* and *enhancement* of diversity. For this reason, constitutional democracies should "[...] find a basis for cohesion without suppressing the capacity for difference, because a mature democratic polity must positively affirm different ways of being and the different goals to which they lead" (An-Na'im, 2014, p. 11). Undoubtedly, this is not a simple goal, but as argued by Justice Thomas Berger, "diversity is not



inconsistent with a common citizenship” (R. Berger, 1085, p. 1) and, in regards to Canada specifically, diversity is at the essence of the country’s constitutional experience.

I would like to thank Professor Amélie Barras for her patience and for her thoughtful comments and suggestions regarding earlier versions of this paper. I am grateful to Professor Benjamin L. Berger for his guidance during my research period at Osgoode Hall Law School in 2015, and for our wonderful and insightful conversations. I owe Professor Faisal Bhabha for our constructive discussions, and Professor Lori G. Beaman and the *Religious and Diversity Project* for enriching my research experience while I was in Canada. Many thanks are owed to Professor Susanna Mancini, Francesco Biagi, Professor Justin O. Frosini, and the CCSD for their encouragement, comments and revision. Any errors remain mine alone.

¹ The oath of citizenship has been given attention by the Canadian Courts in other related cases. A recent one is *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, where three appellants affirmed that the oath violated their rights to freedom of religion and conscience, freedom of expression, and equality rights, guaranteed by the *Canadian Charter of Rights and Freedoms*, 1982. On March 3rd 2015, the Supreme Court of Canada denied the leave to appeal made by the Ontario Court of Appeal. For additional details, please see Sirota, 2014.

² A few examples concerning freedom of religion: *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551; *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256; *Mouvement laïque québécois v. Saguenay (City)* [2015] S.C.C. 16.

³ Under paragraph 3(1)(c) of the *Citizenship Act*, RSC 1985, c C-29, a person is not considered a Canadian citizen until he/she takes the oath. The Oath of Citizenship reads: “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 Canadian citizen.”

⁴ Citizenship and Immigration Canada, Operational Bulletin 359, *Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and procedures for candidates with full or partial face coverings* (12-12-2011).

⁵ *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 6.

⁶ S. 16(1) of the *Charter* establishes: “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada”, further s. 23 asserts the “Minority Language Educational Rights.”

⁷ The constitutional history of Canada has been characterised by the notion that the country is the product of “two founding people”: the French-Catholic and the English-Protestant. This peculiar trait was also entrenched in legal acts such as the *British North America Act, 1867* that, in s. 93, established guarantees for catholic and protestant schools, and s. 133 regulated the use of the English and French languages. The *Charter* represented a landmark change of approach, because it promoted the idea that Canada is *home to diverse communities*. In this respect, s. 27 stipulates that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” (Rolla, 2006).

⁸ References to Aboriginal rights in the *Constitution Act, 1982* are mentioned in s. 25 of the *Charter* (“Aboriginal rights and freedoms not affected by Charter”), and in Part II of the *Constitution Act, 1982*, which includes s. 35 (“Recognition of existing aboriginal and treaty rights”) and 35.1 (“Commitment to participation in constitutional conference”). The latter was added by the *Constitution Amendment Proclamation, 1983*. For further reference on the affirmation of Aboriginal rights in Constitutional documents in 1982, please see McNeil, 1982.

⁹ The risks inherent to identity politics are connected to the role played by groups’ elites in organizing and mobilizing identity-based political movements. At the intra-group level, the elites could force the group to follow traditional and conservative practices. In doing so, the elites silence critics within the groups, labelling any dissent as disloyal or apostatic. At the inter-group level, the risk is that the groups’ elites could be co-opted by the State. This offers them positions of power, while carrying on with processes of assimilation or exclusion of vulnerable groups. The third risk is essentialism. The group tends to describe certain practices as essential to their lives due to historical or religious reasons. The essentialism usually encourages a stereotypical and nostalgic understanding of the groups’ identity (see Eisenberg, 2009).

¹⁰ In Canada, like in other Western countries, Christianity has historically influenced the structure of society from the interpretation of religious freedom to the functioning of social institutions like schools, hospitals and legal systems. For further reference, please see Beaman, 2011.

¹¹ However, Moon underlines that is difficult to reconcile the idea of religion as an identity issue with the claim of truth that every religion makes (Moon, 2008, p. 218).

¹² *Big M Drug Mart Ltd.* [1985] 1 SCR 295 is the first case where religion is considered to be an element of identity.

¹³ Eisenberg, 2014. See Richard Moon's criticism on *Syndicat Northcrest v. Amselem* [2004] 2 SCR 551 in Moon, 2005.

¹⁴ "Policy in this case could be dissuading women who wear a *niqab* from even applying for citizenship." *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 42.

¹⁵ *Mouvement laïque québécois v. Saguenay (City)* [2015] S.C.C. 16.

¹⁶ S. 27 of the *Charter* is not merely an analytical and protective approach, it also has a *proactive* meaning. It was established that "This *Charter* shall be interpreted in a manner consisted with the *preservation* and *enhancement* of the multicultural heritage of Canadians."

¹⁷ The Preamble of the *Charter* stresses the importance of religious tradition: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

¹⁸ For analysis on immigration policies and consequences of identity issues, please see Wayland, 1997.

¹⁹ CIC Policy manual *CP 15: Guide to Citizenship Ceremonies*, s. 6.5.1. (*Witnessing the oath*): "Candidates wearing face coverings are required to remove their face coverings for the oath taking portion of the ceremonies."

²⁰ In *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156 highlights that Ms. Ishaq "will unveil herself to a stranger only if it is absolutely necessary to prove her identity or for purposes of security, and even then, only privately in front of other women." It is also mentioned that Ms. Ishaq had already unveiled herself for identity and security purposes in the past (para 38), for example, when she took her driver's licence (para 36). Although it is not specified, we can assume that, in this instance, Ms. Ishaq unveiled privately, and in front of a woman. This was most likely also the case at the citizenship test taken on November 22nd, 2013.

²¹ Section 2. "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; [...]"

²² Section 15. "(1) Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that aims to improve the conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national, or ethnic origin, colour, sex, age or mental and physical disability."

²³ *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156

²⁴ *Citizenship Regulations, SOR/93-246*

²⁵ *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 53.

²⁶ *Ibidem* para 54.

²⁷ *Ibidem* para 55.

²⁸ *Minister of Citizenship and Immigration (MCI) v Ishaq* 2015 FCA 90.

²⁹ *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

³⁰ *Minister of Citizenship and Immigration (MCI) v Ishaq* 2015 FCA 90, para 29.

³¹ *Minister of Citizenship and Immigration (MCI) v Ishaq* 2015 FCA 194

³² *Ibidem* at para 4.

³³ *Ibidem* at para 5.

³⁴ Even though the measure was declared unlawful on administrative grounds, and Charter issues were not considered by either the Federal Court or the Federal Court of Appeal, the latter pointed out that it remains up to the Minister to impose rules regarding taking the oath, "by way of properly enacted regulations, *subject of course to Charter limits.*" *Minister of Citizenship and Immigration (MCI) v Ishaq* 2015 FCA 212, para 7.

³⁵ To establish whether to grant a motion of stay, Judge Trudel applied the test set out during *RJR-Macdonald Inc. v. Canada (Attorney General)*. The Court found that the Minister had failed on the second element of the test: the irreparable harm. "Presuming that the appellant is right that the Policy at issue is not mandatory and citizenship judges can apply it or not - to use the appellant's language as expressed by counsel at the hearing of the appeal, that the Policy merely amounts to an encouragement in the strongest language possible - how can one raise a claim of irreparable harm?" *Minister of Citizenship and Immigration (MCI) v Ishaq* 2015 FCA 212, para 20.

³⁶ Statement from the Minister of Immigration, Refugees and Citizenship and Minister of Justice. Ottawa, November 16, 2015. Government of Canada website [last access April 2016].

³⁷ *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 38-39.

³⁸ “Ms. Zunera Ishaq is [...] a devout Sunni Muslim who *voluntarily follows* the Hanafi school of thought. [...] She now comes to this Court to challenge a government policy that she claims will deny citizenship to her unless she betrays that conviction.” *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 1.

³⁹ “Nobody is forcing her to cover up, she says. It is a “personal choice” and a way to assert her identity and show her devotion to her Muslim faith” (Quan, 2015).

⁴⁰ “All animals are equal, but some animals are more equal than others”, George Orwell, *Animal Farm*, 1945.

⁴¹ *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 38.

⁴² *Ibidem*, para 21. In 2009, the Muslim Canadian Congress called on the Federal Government to prohibit the *burqa* and *niqab* from being worn, to prevent women from covering their faces in public (The Globe and Mail, 2009).

⁴³ “[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials” *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551, para 46.

⁴⁴ The subjective conception of freedom of conscience and religion can eventually trigger concerns around manipulation, see Maclure, 2011.

⁴⁵ *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551 at para 50.

⁴⁶ *Ibidem* at para 53.

⁴⁷ The Supreme Court of Canada reached a verdict in December 2012 in regards to a case concerning the use of the *niqab*: *R. v N.S.* 2012 SCC 72. Ms. NS was a victim of sexual assault who claimed the right to testify without removing her *niqab*. In her verdict, Justice Abella stated that “sexual assault claimants [...] will be forced to choose between laying a complaint and wearing a *niqab*, which [...] may be no meaningful choice at all.” Faisal Bhabha (2014, p. 879) highlights how in this case, the claimant must choose between breaking a religious conviction - testifying without her *niqab* as requested by the respondents to deliver a fair trial - or deciding to not unveil herself. “If she chooses not to testify, the state will be faced with a choice: either it abandons the prosecution due to lack of evidence, or it asks the court to compel the witness to give her evidence unveiled. This last option lies at the bottom of the slippery slope of state intrusion into personal expression”.

⁴⁸ See note 14.

⁴⁹ *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 8.

⁵⁰ *Citizenship Regulations, SOR/93-246*

⁵¹ “Citizenship is both a cultural and anti-cultural institution, by which I mean that citizenship positions itself as oppositional to specific cultures, even as it is constituted by quite specific cultural values.” In Volpp, 2007, p. 574.

⁵² *Citizenship Regulations, SOR/93 – 246*, section. 21 “[...] a person who takes the oath of citizenship pursuant to subsection 19(1) or 20(1) shall, at the time the person takes it, sign a certificate in prescribed form certifying that the person has taken the oath, and the certificate shall be countersigned by the citizenship officer or foreign service officer who administered the oath and forwarded to the Registrar.”

⁵³ *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, para 25.

⁵⁴ *Ibidem*, para 45.

⁵⁵ Particularly interesting outcomes concerning the *niqab* in Canada resulted from research carried out by the *Canadian Council of Muslim Women*. See Clarke, 2013.

⁵⁶ *Sahin v Turkey*, No 44774/98, [2005] 44 E.H.R.R. 99

⁵⁷ For more on this point, see Susanna Mancini, 2012.

⁵⁸ Judge La Forest in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, asserted that the status of citizen provides individuals with rights and duties, but also “serves a highly important symbolic function as a badge identifying people as members of the Canadian polity”, para. 196.

⁵⁹ In France in 2008, a woman of Moroccan descent was denied citizenship because she chose to wear a *niqab*, and this act was seen as a symbol of extremism (Bennhold, 2008).

Bibliography

- AN-NA'IM, A.A. (2014)** *What Is an American Muslim? Embracing Faith and Citizenship*. New York: Oxford University Press.
- BEAMAN, L.G. (2011)** Assessing Religious Identity in Law: Sincerity, Accommodation, and Harm. In: EISENBERG, A., AND KYMLICKA, W., (eds.) *Identity Politics in the Public Realm: Bringing the Institutions Back In*. Vancouver: UBC Press, pp. 238-259.
- BEAMAN, L.G. (2011)** *Religious Accommodation: Managing Religious Diversity*. Vancouver: UBC Press.
- BENNHOLD, J. (2008)** A Veil Closes France's Door to Citizenship. *The New York Times*, July 19, 2008. Available from: <http://www.nytimes.com/2008/07/19/world/europe/19france.html> [Accessed: May 2015].
- BERGER, B.L. (2008)** The Cultural Limits of Legal Tolerance. *Canadian Journal of Law and Jurisprudence*, XXI, 2, pp. 245-277.
- BERGER, T.R. (1985)** The Charter and Canadian Identity. *University of Western Ontario Law Review*, 23.1,1-8.
- BEYER, P. (2008)** From Far and Wide: Canadian Religious and Cultural Diversity in Glocal/Local Context. In: BEAMAN, L.G., BEYER, P., (eds.) *Religion and Diversity in Canada*. Leiden-Boston: Brill, pp. 9-39.
- BHABHA, F. (2014)** R v. NS: What's Fair in a Trial? The Supreme Court of Canada's Divided Decision on the Niqab in the Courtroom. *Osgoode Legal Studies Research Paper Series*. Paper 75, pp. 871-882.
- CAIRNS, A. et al. (1999)** *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives*. Montreal: McGill-Queens University Press.
- CLARKE, L. (2013)** *Women in Niqab Speak. A study of the niqab in Canada*. Canadian Council of Muslim Woman, Gananoque, Ontario, Canada.

- EISENBERG, A. (2009)** *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims*. New York: Oxford University Press.
- EISENBERG, A. (2013)** Rights in the Age of Identity Politics. *Osgoode Hall Law Journal*, 50, 3, pp. 609-636.
- EISENBERG, A. (2014)** Choice or Identity? Dilemmas of Protecting Religious Freedom in Canada. *RECODE Working Paper*, No. 24, January, 1-15.
- EISENBERG, A., AND KYMLICKA, W. (2011)** Bringing Institutions Back In: How Public Institutions Assess Identity. In: Id. (eds.) *Identity Politics in the Public Realm: Bringing the Institutions Back In*. Vancouver: UBC PRESS, pp. 1-30.
- HOPPER, T. (2015)** Zunera Ishaq - the woman who fought to overturn niqab ban - took citizenship oath wearing one. *National Post*, Oct. 9, 2015. Available from: <http://news.nationalpost.com/news/canada/zunera-ishaq-the-woman-who-made-the-right-to-wear-a-niqab-during-citizenship-ceremonies-a-primary-campaign-issue-is-now-a-canadian-citizen>. [Accessed: October 2015].
- JENSON, J. and PHILLIPS, S.D. (1996)** Regime Shift: New Citizenship Practices in Canada. *International Journal of Canadian Studies*, 14, (Fall/Autumn 1996), pp. 111-135.
- KYMLICKA, W. (1995)** *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford-New York: Oxford University Press.
- LITWIN, F. (2015)** Fred Litwin: Fomenting anti-Muslim sentiments. *National Post*, Oct. 15, 2015. Available from: <http://news.nationalpost.com/full-comment/fred-litwin-fomenting-anti-muslim-sentiments>. [Accessed October 2016]
- LOPRIENO, D. and GAMBINO, S. (2008)** L'obbligo di "accomodamento ragionevole" nel sistema multiculturale canadese. In: ROLLA, G. (ed.) *L'apporto della Corte Suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*. Milano: Giuffrè, pp. 217-240.
- LOWRIE, M. (2015)** Harper says Ottawa will appeal ruling allowing veil during citizenship oath. *The Globe and Mail*, Feb. 12, 2015. Available from: <http://www.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/>. [Accessed: February 2015].
- MACLURE, J. (2011)** Reasonable Accommodations and the Subjective Conception of Freedom of Conscience and Religion. In: EISENBERG, A., AND KYMLICKA, W. (eds.) *Identity Politics in the Public Realm: Bringing the Institutions Back In*. Vancouver: UBC PRESS, pp. 260-280.
- MANCINI, S. (2012)** Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism. *International Journal of Constitutional Law (I•CON)*, 10, 2, pp. 411-428.
- MCNEIL K. (1982)** The Constitutional Rights of the Aboriginal peoples of Canada. *Supreme Court Law Review*, 4, 255, pp. 255-265.

- MCROBERTS, K. (1992)** Constructing Canadian Identities. *Constitutional Forum*, 4, 1 - 4, pp. 93-96.
- MOON, R. (2005)** Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*. *Supreme Court Law Review*, 29 (Summer 2005), pp. 201-220.
- MOON, R. (2008)** Government Support for Religious Practice. In: Id. (ed.), *Law and Religious Pluralism in Canada*. Vancouver: UBC Press, pp. 217-238.
- MOON, R. (2014)** *Freedom of Conscience and Religion*. Toronto: Irwin Law.
- MOON, R. (2015)** The government is sure to lose its appeal in the citizenship oath-niqab case. Maybe that's the point. *National Post*, Mar. 17, 2015. Available from: <http://news.nationalpost.com/full-comment/richard-moon-the-government-is-sure-to-lose-its-appeal-in-the-citizenship-oath-niqab-case-maybe-thats-the-point>. [Accessed: March 2015].
- NATIONAL POST. (2011)** Jason Kenney on banning niqabs, burkas during citizenship oath. *National Post*, Dec 12, 2011. Available from: <http://news.nationalpost.com/news/canada/jason-kenney-on-banning-niqabs-burkas-during-citizenship-oath> [Accessed: May 2015].
- QUAN D. (2015)** Zunera Ishaq on why she fought to wear a niqab during citizenship ceremony: 'A personal attack on me and Muslim women'. *National Post*, Feb. 16, 2015. Available from: <http://news.nationalpost.com/news/canada/zunera-ishaq-the-woman-who-fought-to-wear-a-niqab-during-her-citizenship-ceremony>. [Accessed: February 2015].
- ROLLA G. (2006)** I caratteri di una società libera e democratica secondo la giurisprudenza della Corte suprema del Canada. In: Id. (ed.) *Eguali, ma diversi. Identità ed autonomia secondo la giurisprudenza della Corte Suprema del Canada*. Milano: Giuffrè, pp. 1-10.
- RYDER, B. (2008)** The Canadian Conception of Equal Religious Citizenship. In: MOON, R. (ed.) *Law and Religious Pluralism in Canada*. Vancouver: UBC Press, pp. 87-109.
- SIROTA, L. (2014)** True Allegiance: The Citizenship Oath and the *Charter*. *National Journal of Constitutional Law*, 33, pp. 137-168.
- THE GLOBE AND MAIL (2009)** Muslim group moves to ban burka. *The Globe and Mail*, Oct 7, 2009. Available from: <http://www.theglobeandmail.com/news/national/muslim-group-moves-to-ban-burka/article1206813/> [Accessed: May 2015].
- VOLPP, L. (2007)** The Culture of Citizenship, *Theoretical Inquiries in Law*, 8, 571, pp. 571-601.
- WAYLAND, S.W. (1997)** Immigration, Multiculturalism and National Identity in Canada. *International Journal on Group Rights*, 5, pp. 33-58.