



Religious Freedom in the Public Sector

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Bill 21: An Act Respecting the Laicity of the State

*Prohibition of Religious Symbols For Persons Holding Certain
Positions in Quebec*

- ▶ 1. The State of Québec is a lay State.
- ▶ 2. The laicity of the State is based on the following principles:
 - ▶ (1) the separation of State and religions;
 - ▶ (2) the religious neutrality of the State;
 - ▶ (3) the equality of all citizens; and
 - ▶ (4) freedom of conscience and freedom of religion.
- ▶ 3. State laicity requires parliamentary, government and judicial institutions to comply with the principles listed in section 2, in fact and in appearance, in pursuing their missions.

- ▶ 6. The persons listed in Schedule II are prohibited from wearing religious symbols in the exercise of their functions.
- ▶ A religious symbol, within the meaning of this section, is any object, including clothing, a symbol, jewellery, an adornment, an accessory or headwear, that
 - ▶ (1) is worn in connection with a religious conviction or belief; or
 - ▶ (2) is reasonably considered as referring to a religious affiliation.



PERSONS SUBJECT TO THE PROHIBITION ON WEARING RELIGIOUS SYMBOLS IN THE EXERCISE OF THEIR FUNCTIONS

- ▣ persons who exercise the function of lawyer, notary or criminal and penal prosecuting attorney, including legal managers who supervise the work of those persons or of other legal managers, and who are under the authority of a government department
- ▣ persons who exercise the function of lawyer and are employed by a prosecutor
- ▣ lawyers or notaries acting before the courts or with third persons in accordance with a legal services contract entered into with a minister

Nour Farhat

- “For lawyers in Quebec, not only will a lawyer wearing a religious symbol not be able to exercise the function of a judge or Crown prosecutor, but they will not be able to work as a lawyer in any Quebec ministry, legal aid office, or the clerk's office of a municipal court. This is an obstacle to access to employment for lawyers belonging to religious minorities who wear symbols of their religion.
-since the law has passed, I don't have the right to work as a Crown prosecutor or as a lawyer in any Quebec ministry.”





1.

“Advancing Religious Neutrality”

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▣ *What is State Neutrality?*



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Part of secularism, however, is respect for religious differences. A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests

Loyola SCC (2015), majority, para 43



“

The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them [...] Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism.

Loyola SCC (2015), majority, paras 43, 45

The background of the slide features a classical building with statues on its roofline. A large, semi-transparent quote box with a double-line border is centered on the page. The text inside the box is in a white, italicized serif font. Above the text, there are two horizontal lines, one on the left and one on the right, each ending in a double quote symbol. The overall color scheme is a gradient of purple and blue.

“

[T]he evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief , and the same holds true for non -belief. It requires that the state abstain from taking any position and thus avoid adhering to a particular belief .

Saguenay SCC (2015), majority, para 72

“


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Saguenay SCC (2015), majority, para 72

“

By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals.

Saguenay SCC (2015), majority, para 74



“
This pursuit [of a free and democratic society] requires the state to encourage everyone to participate freely in public life regardless of their beliefs [...]. The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.

Saguenay SCC (2015), majority, para 74

“

When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. [...]

Today, the state's duty of neutrality has become a necessary consequence of enshrining the freedom of conscience and religion in the Canadian Charter and the Quebec Charter.

Saguenay SCC (2015), majority, para 74



“

A society's cultural reality precludes an excessively radical conception of state neutrality [...] It follows that the state's duty of neutrality does not go so far as to require complete secularity.

Saguenay SCC (2015), citing QCCA decision, para 77

“

▣ *Religious neutrality or anti - religious?*



2.

Religious Freedom & Equality



PERSONS SUBJECT TO THE PROHIBITION ON WEARING RELIGIOUS SYMBOLS IN THE EXERCISE OF THEIR FUNCTIONS

- ▣ persons who exercise the function of lawyer, notary or criminal and penal prosecuting attorney and who are under the authority of a government department
- ▣ persons who exercise the function of lawyer and are employed by a prosecutor
- ▣ lawyers or notaries acting before the courts or with third persons in accordance with a legal services contract entered into with a minister

Is Religion a Choice?

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- “s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion”

Is Religion a Choice?

- “s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion”
 - s. 15 grounds are all “immutable or changeable only at unacceptable cost to personal identity.”

Is Religion an Opinion?

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, para 73 citing Prof. R. Moon.

Is Religion an Opinion?

- “religious belief is more than an opinion. It is the lens through which people perceive and explain the world in which they live. It defines the moral framework that guides their conduct. Religion is an integral part of each person’s identity.”



“

- ▣ *Integrity*
- ▣ *Faith is integral*
- ▣ *Suggests that religious lawyers are incapable of impartiality*



“

- ❑ *Bill 21 fails to recognize that the exercise of one's public duties may be enhanced – not prejudiced – by one's religious commitments and background.*

Justices
L'Heureux-
Dubé &
McLachlin

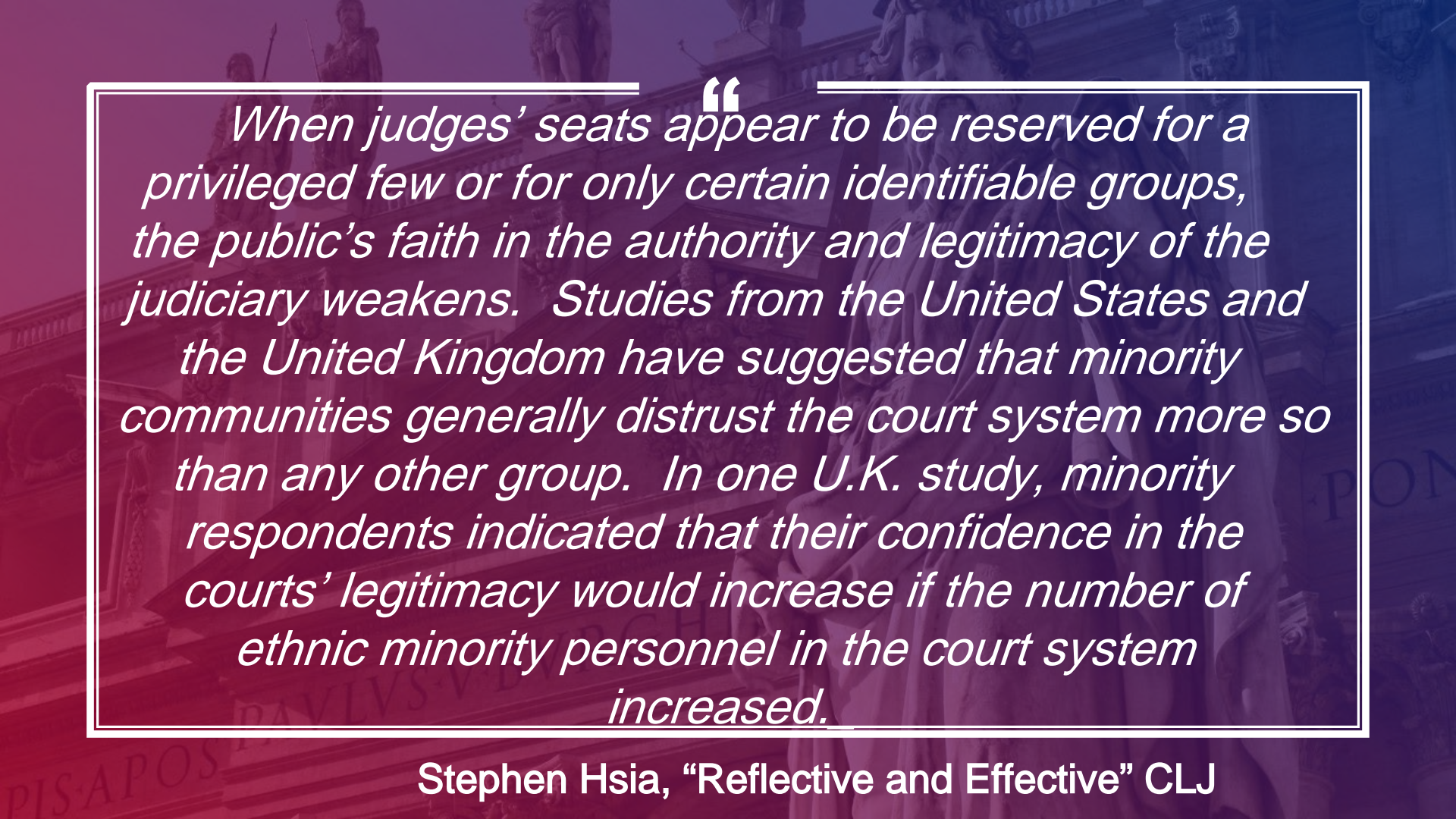
“[J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar.”



“

“A judiciary that is not itself inclusive and diverse cannot adequately do justice to the needs of an inclusive and diverse society”

Lorne Sossin and Sabrina Lyon, “Data & Diversity in the Canadian Justice Community”



“When judges’ seats appear to be reserved for a privileged few or for only certain identifiable groups, the public’s faith in the authority and legitimacy of the judiciary weakens. Studies from the United States and the United Kingdom have suggested that minority communities generally distrust the court system more so than any other group. In one U.K. study, minority respondents indicated that their confidence in the courts’ legitimacy would increase if the number of ethnic minority personnel in the court system increased.”

Stephen Hsia, “Reflective and Effective” CLJ



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2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

(Code of Professional Conduct for Manitoba)



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Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer - client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

(Code of Professional Conduct for Manitoba, 2.2 Commentary)

“

Religious minorities should not be denied equal access to professions and vocations because of their religiously -informed identity and ethics [...] integration [of one's religious identity with their work] is foundational to a professional's integrity , which is a fundamental quality and essential element in all professional relationships .

▣ *CLF Factum in CPSO v CMDS*



“

For many religious lawyers, faith is an integral part of what makes them whole and complete [...] for the religious lawyer, faith does not necessarily present a crisis or a threat to professionalism. In fact, it can offer the possibility of a meaningful and self-fulfilling professional life that allows lawyers to serve clients in ways that accord with their faith-based commitments.”

■ Faisal Babha, “Religious Lawyer and Legal Ethics”



“

Examining the law from one's religious perspective not only offers answers to the practical question of how to be a good lawyer and a good person, but also responds to deeper and more existential questions such as why try to be a good person in the first place. For many religious people, this larger overarching framework provides a moral anchor that enables them to not only resist temptations of greed and abuse of power but also to situate their legal work within a sense of responsibility and service to the community.

□ Russell Pearce, “Religious Lawyering in a Liberal Democracy”



The Charter And the Notwithstanding Clause



Notwithstanding clause

- **Exception where express declaration**
- **33. (1)** Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.



“

- *The Notwithstanding Clause only applies to certain provisions contained in the Charter, but religious freedom in Quebec and the rest of Canada has been long-recognized before 1982.*

“

...freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.

Saumur v Quebec (1953), per Rand J at 329

“

The Charter is neither the source of nor basis for natural and fundamental rights – it affirms and recognizes them and commits Canada’s governments to respect and protect them. But there are anterior and higher sources of truth and rights than those found in the Charter – this is affirmed in the Charter’s preamble itself.



Charter Preamble

- ▣ Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

“

■ *Freedom of religion and freedom of conscience are “anterior to positive law”. These freedoms “find their existence in the very nature of man” and are entrenched in “natural law, first of all our laws”. They “cannot be taken away and they must prevail should they conflict with the provisions of positive law”.*

*(Chabot v. School Commissioners of Lamorandiere
(QCCA, 1957)*



“

- *Just as the government could not “override [a] basic principle of natural law” prior to the enactment of the Charter, it cannot do so now.*



“

- ▣ 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

The background is a photograph of a classical building facade, likely a church or government building, with statues on pedestals and inscriptions. The image is overlaid with a semi-transparent red filter. A white double-line border frames the central text area.

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▣ 31. Nothing in this Charter extends the legislative powers of any body or authority.

CLF Submission to National Assembly

“In short, freedom of religion does not rise and fall with the Charter. All people have an inherent and inalienable right to freedom of religion, which not even the Notwithstanding Clause can eradicate.”



“

- 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.



2.

Justifying Restriction of Human rights



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- ▣ *According to supporters of Bill 21, the alleged ‘harm’ that purportedly arises from the wearing of religious symbols is that it detracts from the appearance that public officials are ‘neutral’. But neutrality is required of the state, not individuals.*



“

“It’s not racist. It’s not sexist. It’s just the way that Quebecers want to have people with authority... We don’t want people with authority ... to wear religious symbols — it’s as simple as that. It applies to men and women.”

Quebec Education Minister Jean-François Roberge

The background is a photograph of a classical building facade, likely a church or government building, with statues on pedestals and inscriptions like "PAVLVS·V·BVRGH" and "PIS·APOS". The image is overlaid with a semi-transparent red filter. A white double-line border frames the central text area.

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▣ *State neutrality exists not to coerce irreligious uniformity, but to promote and enhance religious diversity.*



3.

Protection of Religious Freedom

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- *International human rights instruments, including those by which the government of Quebec has declared itself to be bound, also protect freedom of religion. The **International Covenant on Civil and Political Rights** guarantees freedom of religion, including the right, “in public or private”, to manifest religion or belief “in worship, observance practice and teaching”. It also guarantees freedom from discrimination based on one’s religion.*

“

- *The International Covenant on Economic, Social and Cultural Rights* expressly protects the right to work, “without discrimination of any kind as to ... religion”, and affirms that the state must “take appropriate steps to safeguard this right” Due consideration and respect must be afforded to these commitments.

Article 2(2), 6

“

As lawyers of faith, we view the practice of law as a manifestation of our religious commitments. Our religion is what compels us to serve our clients with compassion and to seek justice with integrity. It would be a profound loss to the public interest and common good if religious lawyers...were denied the opportunity to participate equally in the administration of justice..



“

“The secular State must take its orders from the people through its elected representatives and not the churches. The religious neutrality of the State demands that public institutions not favour any religion, not that the individuals who frequent the institutions relegate to the private sphere displays of their religious affiliation.”

“

- *Why should we think that the person who wears a religious sign would be less likely to display impartiality, professionalism and loyalty to the institution than the person who does not wear such a sign? Why, therefore, dwell on external displays of faith? Should we not also demand of State employees that they relinquish any conviction of conscience? It would obviously be absurd to do so.*



“

What stance should we adopt in light of these contradictory considerations? We believe that a majority of Quebecers accept that a uniform prohibition applying to all government employees regardless of the nature of their position is excessive, but want those employees who occupy positions that embody at the highest level the necessary neutrality of the State, such as judges or the president of the National Assembly, for example, to impose on themselves a form of circumspection concerning the expression of their religious convictions.



“

“We were very naive,” Taylor said. “The very fact we were talking about this kind of a plan started to stimulate hate incidents, not just in Quebec but all over. Just talking about these kinds of policies caused enormous harm to our society. You can’t imagine the division, the sense of alienation that this causes for vulnerable minorities.”



“

“Even going down this path in a minimalist way saying certain people can’t do certain jobs gives comfort and encouragement and creates a really frightful climate. The discussion here is a bit angelic. It does not reflect what is happening on the ground.”

“I really changed my mind when I saw the consequences of such policies.”

- ▶ Removing religious identities from the public square
- ▶ Perpetuating negative stereotypes about religious communities
- ▶ Privatizing/stigmatizing religion generally
 - ▶ “[France’s minister of national education] set off a controversy in France recently when he suggested that it was ‘not desirable’ for Muslim women accompanying their children on school field trips to wear head scarfs.”



4.

Canadian Bar Association's Response

CBA Resolution 20-08-A,
*Commitment to religious
equality in the legal
profession,*
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to-religious-equality-in-
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tions/2020/Commitment-
to-religious-equality-in-
the-legal-prof/20-08-A.pdf)

- WHEREAS lawyers from diverse religious communities have made and continue to make important contributions to the legal profession and cause of justice in Canada
- WHEREAS the Canadian Bar Association recognizes that the administration of justice is enriched by the equal and full participation of religious lawyers without discrimination;
- WHEREAS any law denying equal opportunities to legal professionals based on their religion is unjust, antithetical to the principles of an independent and diverse bar, and contrary to the public interest

CBA Resolution 20-08-A,
*Commitment to religious
equality in the legal
profession,*
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to-religious-equality-in-
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BE IT RESOLVED THAT the Canadian Bar Association:

- affirm its commitment to religious equality and diversity, and to combatting any religious discrimination within the legal profession and against lawyers based on their religious beliefs
- denounce any law and deter any government policy that denies equal opportunities within, or access to, the legal profession based on a person's religion, and in particular Quebec Bill 21...



5.

Litigation Thus Far

*Nak v Attorney General of
Quebec*, 2019 QCCA
2145(CanLII)
[request for temporary
stay of Bill 21]

- QCCA: Bill 21 is causing harm which may be irreparable to teachers who wear religious symbols
- Majority – not clear that s. 28 precludes invocation of s. 33
- Hesler C.J. (dissenting) – test for stay met: “it would be best to prioritize respect for fundamental rights during the proceedings [...] rather than deprive individuals of their fundamental rights, even for a limited time.” (unofficial translation)

*Nak v Attorney General of
Quebec*, 2019 QCCA
2145(CanLII)
[request for temporary
stay of Bill 21]

- SCC denied leave on April 9, 2020
- Decision still to be heard on merits, along with three other claims, expected to be heard together in October 2020
 - Ms. Nak, National Council of Muslims, Canadian Civil Liberties Association
 - Coalition Inclusion Quebec (three school teachers)
 - English Montreal School Board (EMSB)
 - Fédération autonome de l'enseignement (teachers union)

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Thank You!

Any questions?

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