

Quebec's Bill 21 and the secular conceit of religious neutrality

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Abstract

Quebec's Bill 21, An Act respecting the laicity of the State, prohibits many categories of civil servants from wearing religious symbols while on duty. Although popular in Quebec, the legislation has been denounced elsewhere as an intrusion into matters that fall outside state authority. In this article, I survey the history of Bill 21 and situate its conception of religious neutrality within the spectrum of Canadian perspectives on this issue. Specifically, I juxtapose Bill 21's restrictive understanding of this principle with a more inclusive vision of religious neutrality that creates meaningful space for the participation of religious minorities in public life.

Keywords Canada, secularism, laicity, religious freedom, liberalism.

Bill 21 marks a reckoning in the public role of religion in Quebec. The legislation, titled "An Act respecting the laicity of the State," prohibits many of the province's civil servants from donning any kind of religious clothing or symbols while on duty.² The banned items range from hijabs and turbans to kirpans and crucifixes. Affected public employees include police officers, teachers, judges and lawyers, among others.³

The Quebec government has repeatedly insisted that Bill 21 is necessary to promote the secular ideal of *laïcité*, under which state authority must be exercised without reliance on or reference to religious conviction.⁴ The law notably amends the Quebec Charter of Human Rights and Freedoms (a quasi-constitutional document with which all of the province's laws must comply, and which itself is sub-

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² "An Act respecting the laicity of the State," SQ 2019, c 12 (hereafter "Bill 21").

³ Canadian Civil Liberties Association, "Bill 21: The Law against Religious Freedom." Available at: <https://ccla.org/bill-21/>.

⁴ François Legault, "Enfin un projet de loi sur la laïcité de l'État!" (English translation: "Finally, a Bill on the Secularism of the State!"), 31 March 2019. Available at: <https://fb.watch/3pQE4paFSX/>. See also Morgan Lowrie, "Legault Defends Quebec's Religious-Symbols Bill, Calls Notwithstanding Clause 'Legitimate Tool,'" *The Globe and Mail*, 31 March 2019. Available at: <https://tgam.ca/3GDKWlf>; Jason Magder, "Legault Defends Bill 21: 'Think of What's Best for Our Children,'" *Montreal Gazette*, 6 April 2019. Available at: <https://bit.ly/3muv2S2>.

ject only to the Canadian constitution) by inserting a declaratory preamble on the “fundamental importance” of this principle.⁵ According to its proponents, Bill 21 entrenches four principles in Quebec law: the religious neutrality of the state, the separation of religion and the state, the equality of all citizens, and freedom of conscience and religion.⁶

In this article, I consider Bill 21 and its secular conception of the state’s duty of religious neutrality. My analysis contains five parts. The first part recounts the recent history of religious accommodation in Quebec, leading up to the passage of Bill 21. The second part reviews the public response to Bill 21, including the current status of litigation seeking to constitutionally invalidate the law. The third part situates Bill 21 within a spectrum of contested visions on what religious neutrality entails, and the fourth part briefly surveys how religious neutrality has been applied within Canadian constitutional jurisprudence. The fifth part demonstrates why, in my view, Bill 21 is inconsistent with an inclusive conception of religious neutrality that makes room for the participation of visible religious minorities in public life.

1. Religious accommodation in Quebec

The passage of Bill 21 did not arise in a vacuum. Religion has been a source of public tension in Quebec since the Quiet Revolution of the 1960s. This anxiety has been felt in recent debates over the extent to which religious minorities should be accommodated in Quebec society. In 2006, the Supreme Court released its decision in *Multani v Commission scolaire Marguerite-Bourgeoys*, in which it ruled that a Quebec school board had unjustifiably limited the religious freedom of a Sikh student by not accommodating his request to wear his kirpan (a type of ceremonial dagger) to school.⁷ The ruling proved contentious in Quebec and was soon followed by similar controversies regarding the accommodation of other religious minorities such as Muslims and Orthodox Jews.⁸ In response to mounting political pressure, Liberal Premier Jean Charest established a commission in 2007, chaired by Gérard Bouchard and Charles Taylor, to recommend how religious minorities should be accommodated in light of “Quebec’s values as a pluralistic, democratic, egalitarian society.”⁹

⁵ Bill 21, preamble.

⁶ Bill 21, article 2.

⁷ *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

⁸ Celine Cooper, “Bouchard-Taylor-Commission on Reasonable Accommodation in Quebec (2007-2008),” *The Canadian Encyclopedia*, 3 June 2020. Available at: <https://bit.ly/3by8qtu>.

⁹ Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation* (Québec: Consultation Commission on Accommodation Practices Related to Cultural Differences, 2008), 17.

The 2008 report of the Bouchard-Taylor Commission concluded that, contrary to public perception, there had been no “striking or sudden increase in the adjustments or accommodation that public institutions allow,” nor any indication that “the normal operation of our institutions would have been disrupted by such requests.” Nevertheless, the authors conceded that there was a growing “feeling of discontent . . . among Quebecers” toward accommodation, particularly as “members of [Quebec’s] ethnocultural majority” – themselves a minority within Canada – “are afraid of being swamped by fragile minorities that are worried about their future.”¹⁰

Such discontent was particularly evident with regard to the issue of secularism. The report held that all secular systems must seek to balance the principles of equality, freedom of conscience and religion, separation between church and state, and “[s]tate neutrality in respect of religious and deep-seated secular convictions.”¹¹ While noting that countries such as France had adopted restrictive laws on the wearing of religious symbols in public schools, Bouchard and Taylor concluded that such policies would be inappropriate in Quebec. Notably, they held that “emancipatory mission[s] directed against religion [are] not compatible with the principle of State neutrality in respect of religion and non-religion,” advocating instead for an “open secularism” that avoids “relegating [religious] identities to the background.”¹² Such a stance, they concluded, is less “a constitutional principle” or “identity marker to be defended” than “an institutional arrangement . . . aimed at protecting rights and freedoms,” under which citizens are entitled to “express their religious convictions inasmuch as this expression does not infringe other people’s rights and freedoms.”¹³

Notwithstanding the findings of the Bouchard-Taylor Commission, accommodation of religious and cultural minorities remained a live issue in Quebec throughout the 2010s. In 2013, the minority Parti Québécois government introduced Bill 60, the so-called Charter of Quebec Values.¹⁴ The legislation sought to reform the law of religious accommodation in Quebec; among other things, it would have prohibited public employees from wearing religious symbols while on duty (as Bill 21 does) and would have further required that anyone providing or receiving public services

¹⁰ Bouchard and Taylor, *Building the Future*, 18.

¹¹ Bouchard and Taylor, *Building the Future*, 18.

¹² Bouchard and Taylor, *Building the Future*, 20.

¹³ Bouchard and Taylor, *Building the Future*, 141. See also Lori G. Beaman, “Battles over Symbols: The ‘Religion’ of the Minority Versus the ‘Culture’ of the Majority,” *Journal of Law and Religion* 28(1):67 (2012-2013):75.

¹⁴ Bill 60, “Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests,” 1st Sess., 40th Leg., Quebec, 2013.

remove any kind of face covering, religious or otherwise.¹⁵ An election was called in 2014 before Bill 60 could be passed, resulting in the Liberal Party returning to power under the leadership of Premier Philippe Couillard.¹⁶

In 2015, the majority Liberal government introduced Bill 62, “An Act to foster adherence to State religious neutrality.”¹⁷ Like its Parti Québécois predecessor, Bill 62 prohibited persons from providing or receiving public services if their face was covered, but it also provided a framework for accommodation requests on religious grounds.¹⁸ Shortly following its passage, litigation was filed seeking to invalidate Bill 62’s face covering ban as an unreasonable limitation on the constitutional guarantee of religious freedom.¹⁹ In a 2018 order, the Quebec Superior Court stayed the application of the prohibition pending a full constitutional analysis on judicial review.²⁰ The Liberal government lost power in a general election to the Coalition Avenir Québec later that year, after which Premier François Legault introduced the aforementioned Bill 21, eventually passed by the National Assembly of Québec in 2019.

2. The response to Bill 21

Polls following Bill 21’s passage confirmed the law’s popularity among a majority of Quebec voters.²¹ Outside the province, however, the legislation has been widely denounced as an unjustified restriction of freedom of religion and the right not to be discriminated against on the basis of religion, both of which are guaranteed by sections 2(a) and 15, respectively, of the Canadian Charter of Rights and Freedoms.²² Litigation challenging the constitutionality of Bill 21 began mere

¹⁵ Bill 60, articles 5-7.

¹⁶ Editorial Board, “Couillard Should Bury the Charter of Values,” *The Globe and Mail*, 20 April 2014. Available at: <https://tgam.ca/3GEzT2>

¹⁷ Bill 62, “An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies,” 1st Sess., 41st Leg., Quebec, 2015 (assented to 19 October 2017) SQ 2017, c 19.

¹⁸ Bill 62, articles 9, 11.

¹⁹ See *National Council of Canadian Muslims (NCCM) v. Quebec (Attorney General)*, 2017 QCCS 5459, para. 38, in which the Court stayed the application of the face covering ban until Bill 62’s accommodation criteria came into effect.

²⁰ *National Council of Canadian Muslims (NCCM) v. Quebec (Attorney General)*, 2018 QCCS 2766, paras. 26, 83.

²¹ Philip Authier, “Bill 21: Legault Says the Government Listened to the Majority and Acted,” *Montreal Gazette*, 19 June 2019. Available at: <https://bit.ly/3jVGapA>.

²² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 2(a), 15 (hereafter Charter). The Canadian Civil Liberties Association, one of Canada’s most prominent civil liberties organizations, has argued that Bill 21 effectively imposes the government’s “beliefs” on Quebeckers by “dictating to individuals what they can and cannot wear”; see “The Law against Religious Freedom.” The National Council of Canadian Muslims claims that the legislation will “enforce second class citizenship based on an individual’s

hours following its passage.²³ Other constitutional challenges soon followed. In December 2019, the Quebec Superior Court ordered that all of these cases would be heard together.²⁴ The Court upheld the legislation as constitutionally valid in a 2021 decision.²⁵ Leave to appeal has been granted by the Quebec Court of Appeal, though most observers expect that the litigation will inevitably work its way up to the Supreme Court of Canada in view of the fundamental constitutional questions it poses.

The result of the challenge to Bill 21 is anything but certain. Under normal circumstances, Canadian courts would unquestionably invalidate a law which blatantly seeks to prevent openly religious individuals from participating in the civil service. Enter section 33 of the Charter. Anticipating that Bill 21 would be heavily litigated, the Quebec government pre-emptively invoked this so-called “notwithstanding clause,” a peculiar provision of the Canadian Constitution that allows governments to derogate from certain Charter guarantees.²⁶ So far, this strategy has proven successful. Although the Quebec Superior Court found that Bill 21 sends an “explicit message” to religious minorities “that their faith and the way they practice it do not matter and that their faith does not carry the same dignity or require the same protection from the State,” it held that it could not invalidate the legislation due to the invocation of the notwithstanding clause.²⁷

This broadly accepted description of section 33 as permitting derogations from the Charter is inconsistent with how this concept is usually understood in international human rights law. Under Article 4 of the International Covenant on Civil and Political Rights, a United Nations treaty to which Canada is a party, derogations from rights and freedoms can be permitted only in times of public emergency (the exist-

identity and religion” by legalizing “systemic discrimination against minorities”; see National Council of Canadian Muslims, “Defeat Bill 21.” Available at: <https://www.nccm.ca/defeatbill21/>; Christian Legal Fellowship, the largest association of Christian lawyers, legal scholars and law students in Canada, has said that the bill “violates a foundational right of any free and democratic society: the right to openly and publicly identify as religious.” See Christian Legal Fellowship, “Quebec’s Bill 21 and the Ban of Religious Symbols.” Available at: <https://www.christianlegalfellowship.org/bill21>.

²³ Christopher Curtis, “Bill 21 Challenged in Court by the Lawyer Who Faced Down Bill 62,” *Montreal Gazette*, 18 June 2019. Available at: <https://bit.ly/3GBUMEF>.

²⁴ Jonathan Montpetit, “One Law, Many Challenges: How Lawyers Are Trying to Overturn Quebec’s Religious Symbols Ban,” *CBC News*, 12 December 2019. Available at: <https://bit.ly/3buoFrC>; Jonathan Montpetit, “As Trial over Quebec Religious Symbols Ban Wraps Up, Minority Rights Hang in the Balance,” *CBC News*, 21 December 2020. Available at: <https://bit.ly/3pTY4fX>.

²⁵ *Hak c Procureur general due Québec*, 2021 QCCS 1466.

²⁶ Bill 21, article 34; Charter, section 33. Note that invocations of section 33 are subject to renewal by the enacting legislature every five years, effectively forcing governments that resort to this clause to receive a fresh democratic mandate to continue using it.

²⁷ *Hak*, para. 70; unofficial English translation provided at “Bill 21 Ruling,” Christian Legal Fellowship, 23 April 2021. Available at: <https://bit.ly/3jRHed0>.

ence of which must be declared in advance) and protections such as freedom of thought, conscience and religion can never be subject to derogation.²⁸ Not only can section 33 be invoked to derogate from many of these same guarantees, but governments are not required to provide any sort of rationale to justify its use. Further investigation of this inconsistency lies beyond the scope of the present article, but this observation may help to explain why Bill 21 has proven to be so controversial outside Quebec.

3. The religious neutrality spectrum

The Canadian principle of religious neutrality has been subject to conflicting scholarly and judicial visions of the state's constitutional obligations vis-à-vis religion. These conceptions of religious neutrality tend to fall along a spectrum. At one end of this continuum is what I call "inclusive" religious neutrality.²⁹ Under this conception, the purpose of religious neutrality is to circumscribe the state's theological authority by preventing it from adopting laws that either dictate religious belief or otherwise compel people to change their religion. In some circumstances, the state is permitted and even encouraged to preserve and create positive public space for religious adherents (for example, by subsidizing charitable religious activities that pursue a common or public good), as long as it does so in an even-handed manner and does not privilege one religion to the exclusion of others. At the other end of this spectrum are "closed" conceptions of religious neutrality, to borrow the terminology that Janet Epp Buckingham uses to describe expressions of secularism in which "[t]he state inhibits religion and perceives it to be a threat to society."³⁰ In its most extreme forms, this type of neutrality seeks to purge any and all expressions of religious conviction from the public square; only irreligious worldviews can contribute to public discourse, and the state is prevented from even indirectly facilitating religious expression.

In some respects, it is difficult to map Bouchard and Taylor's vision of "open secularism" onto the spectrum of religious neutrality I propose here.³¹ Although liberal democracies such as Canada are often perceived as offering robust guarantees of religious freedom, liberal visions of neutrality frequently strip religion of any meaningful public role. Richard Moon represents this disposition as one in which

²⁸ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976), article 4. See also Frédéric Mégret, "Nature of Obligations," in Daniel Moeckli et al. (eds.), *International Human Rights Law*, 3rd ed. (Oxford: Oxford University Press, 2017), 103-104.

²⁹ See Kristopher E. G. Kinsinger, "Inclusive Religious Neutrality: Rearticulating the Relationship Between Sections 2(a) and 15 of the Charter," *SCLR* (2d) 91 (2019), 237-239.

³⁰ Janet Epp Buckingham, "The Role of the Secular State Vis-à-Vis Religion," *SCLR* (2d) 91 (2019), 191.

³¹ Bouchard and Taylor, *Building the Future*, 134-137.

“neutrality is possible only if religion can be treated as simply a private matter – separable from the civic concerns addressed by the state.”³² Such an outlook, as Benjamin Berger further explains, has arisen in large part out of liberalism’s insistence on banishing “interest and preference from the realm of public debate, which is instead consecrated to reason.”³³

The liberal assertion that religion exists outside the realm of rational public discourse is, unsurprisingly, contested by religious scholars. Jonathan Leeman, for example, describes such views as “modern, Western construction[s] devised for the purpose of creating the religion/politics divide, thereby legitimating certain practices, delegitimizing others and yielding the liberals’ preferred political configuration.”³⁴

Importing liberal secularism into Quebec’s distinct society is especially challenging, as key terms of reference are often subject to conflicting definitions. Bouchard and Taylor, for example, define laicization as “the process through which the State asserts its independence in relation to religion,” in contrast to secularization, which “refers to the erosion of religion’s influence in social mores and the conduct of individual life.”³⁵ Lori G. Beaman notes that, in “[distancing] this version of secularism from the French version,” Bouchard and Taylor sought to propose “a home-made” vision of *laïcité* which “[takes] into account Québec’s unique history.”³⁶ Other Quebec scholars, however, emphasize the inherent tensions embedded within liberal conceptions of secularism. Shauna Van Praagh, for example, suggests that “while today’s liberal cosmopolitan state must think hard about the justification for sending messages or making rules that are meant to reflect shared norms of all members of society, it inevitably insists on trying to define limits to explicitly religious participation in public life.”³⁷ Dia Dabby echoes these comments in her

³² Richard Moon, “Freedom of Religion under the Charter of Rights: The Limits of State Neutrality,” *UBC Law Review* 45 (2012):501.

³³ Benjamin L. Berger, *Law’s Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015):91.

³⁴ Jonathan Leeman, *Political Church: The Local Assembly as Embassy of Christ’s Rule* (Downers Grove, IL: InterVarsity Press, 2016), 77, citing William T. Cavanaugh, “What is Religion?” in Michael C. Desch and Daniel Philpott (eds.), *Religion and International Relations: A Primer for Research. Report of the Working Group on International Relations and Religion of the Mellon Initiative on Religion Across the Disciplines* (Notre Dame, Indiana: University of Notre Dame, 2013) 63, 65. Note that Leeman is “sympathetic to [Cavanaugh’s] general project” but holds that his constructivist perspective need not be viewed as being mutually exclusive with a substantivist or functionalist approach to defining religion: Leeman, *Political Church*, 76-77.

³⁵ Bouchard and Taylor, *Building the Future*, 135.

³⁶ Beaman, “Battle over Symbols,” 75.

³⁷ Shauna Van Praagh, “‘Inside Out / Outside In’: Coexistence and Cross-Pollination of Religion and State,” in René Provost, ed., *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford: Oxford University Press, 2014), 123.

analysis of Bill 60, one of Bill 21's spiritual predecessors. Secularism, she contends, is a "societal project," one that "appropriates religion" by "defining, shaping and even transforming it."³⁸ In this regard, Bill 60 represented an attempt "to alter the place that religion occupies in Quebec society."³⁹

The points along the religious neutrality spectrum I briefly outline here represent far more than divergent applications of guarantees such as religious freedom of religious equality. At its core, one's conception of religious neutrality determines how religion is defined. Inclusive and closed approaches to religious neutrality are informed by assumptions about the extent to which explicitly religious identities and beliefs ought to infuse public life. Indeed, as Van Praagh argues, "When religious claims compete with liberalism as alternative, comprehensive ways to order private and public life, then both religion and state engage in constant negotiation of the everyday ways in which they can coexist in a mode of respect if not deference."⁴⁰ The settlements arrived at following such negotiation determine whether visibly religious minorities are granted the benefits of full citizenship in liberal societies, an issue to which I return in section 5 below.

4. Religious neutrality in Canadian public law

Although there is a growing body of Canadian case law on religious neutrality, the Supreme Court has struggled at times to apply this principle to cases where litigants seek to preserve their religious identity within public institutions.⁴¹ This is unsurprising. Litigation concerning the state's duty of religious neutrality will engage multiple constitutional principles, forcing jurists to interrogate disputed assumptions about the boundaries between public and private life. "When a belief is accompanied by conduct," Berger contends, "its presence as an expression in the world pushes it closer to – or into – the public and, in doing so, threatens the introduction of interest and preference in the realm of reason."⁴² Beaman similarly concedes that "the institutional sanctioning of religious symbols" is more than a mere "theoretical [issue] for those who have a religious commitment that calls them to wear or protect religious symbols that resonate for them."⁴³

³⁸ Dia Dabby, "Constitutional (Mis)Adventures: Revisiting Quebec's Proposed Charter of Values," *SCLR* 71 (2015), 356, quoting Elizabeth Shakman Hurd, "International Politics after Secularism," *Rev Int'l Stud* 38 (2012), 955.

³⁹ Dabby, "Constitutional (Mis)Adventures," 356-357.

⁴⁰ Van Praagh, "Inside Out / Outside In," 138.

⁴¹ Kinsinger, "Inclusive Religious Neutrality," 231-232, 238-239. See, e.g., *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

⁴² Berger, *Law's Religion*, 93.

⁴³ Beaman, "Battle over Symbols," 13.

Still, despite its occasional diffidence, the Supreme Court has been gradually trending toward an inclusive conception of religious neutrality since the adoption of the Charter.⁴⁴ The 1985 decision in *R. v Big M Drug Mart Ltd.* marks the Court's first major Charter-era ruling on religious freedom.⁴⁵ Chief Justice Dickson's majority reasoning was notably reinforced by an unstated commitment to religious equality. While the Chief Justice recognized that the guarantee of freedom of religion is grounded in principles of individual liberty, his reasoning also highlighted why explicitly religious laws (in that specific case, legislation requiring businesses to observe the Christian Sabbath) will run afoul of the Charter, noting that the "theological content of . . . legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture."⁴⁶ In other words, the Charter prevents majoritarian religions from excluding minority religious groups from public life.

In the decades since the *Big M* ruling, the Supreme Court has articulated with increasing precision what the state's duty of religious neutrality entails. The court's 2012 majority ruling in *S. L. v Commission scolaire des Chênes* is particularly instructive. In this case, Justice Deschamps found that neutrality is realized when "the state neither favours nor disfavors any particular religious belief, that is, when it shows respect for all postures toward religion, including that of having no religious beliefs whatsoever."⁴⁷ Justice Gascon's majority reasoning in the Supreme Court's subsequent 2015 ruling in *Mouvement laïque québécois v Saguenay (City)* took Justice Deschamps' observations from *S. L.* even further.⁴⁸ A truly neutral public space, Justice Gascon noted, "does not mean the homogenization of private players in that space" since "[n]eutrality is required of institutions and the state, not individuals." Under this view, religious neutrality protects the "freedom and dignity" of believers and non-believers alike.⁴⁹

5. Dismantling secularism's private-public divide

Closed visions of religious neutrality, in my view, ultimately fail to recognize that even secular governments will be forced to invariably take positions on issues that affect or relate to religious belief. In this regard, Bill 21 is a quintessential example of how a closed approach to religious neutrality excludes religious minorities from

⁴⁴ For a more thorough examination of this line of jurisprudence, see Kinsinger, "Inclusive Religious Neutrality," 223-231.

⁴⁵ *R. v Big M Drug Mart*, [1985] 1 SCR 295.

⁴⁶ *R. v Big M Drug Mart*, para. 97.

⁴⁷ *S. L. v Commission scolaire des Chênes*, 2012 SCC 7, para. 32.

⁴⁸ *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

⁴⁹ *Mouvement laïque québécois v Saguenay (City)*, para. 74.

the full benefits of public citizenship, contrary to Justice Gascon's vision of "a neutral public space that is free of discrimination and in which true freedom to believe or not believe is enjoyed by everyone equally."⁵⁰ Although the Quebec government insists that Bill 21 is grounded in the constitutional principle of religious neutrality, the law is fundamentally inconsistent with the trajectory of religious neutrality in Canadian jurisprudence.⁵¹ Bill 21 does not preserve a religiously neutral public space, but instead forces front-line public employees to give the appearance of irreligiosity if they want to keep their jobs. The Quebec government's decree that these employees must hide their faith-based identities while undertaking their public duties constitutes an insistence that they must adopt alien religious identities in order to participate fully in public life. Such a policy is anathema to an inclusive conception of religious neutrality.

The type of "secular" society envisioned by Bill 21 is further premised on the myth that it is somehow possible for the state to be truly neutral toward religion. An inclusive understanding of religious neutrality, in contrast, does not seek to prevent governments from enacting laws that have religious implications. Insisting otherwise would prevent the state from pursuing policies on any number of important issues. As Berger explains, "the character of religion itself unsettles and frustrates the ideal of state neutrality in a ... foundational way."⁵² The public-private divide that dominates liberal political theory breaks down when one seeks to apply it to matters of religion. "If one understands religion as a normative and cultural system that produces claims about ethics, has implications for conduct, and advances a vision of a good society," Berger observes, then "religion will have much to say about matters of broad public policy import."⁵³ Moon concurs, noting, "Because religious beliefs sometimes address civic concerns," they "are often difficult to distinguish from non-religious beliefs" and therefore "cannot be fully excluded or insulated from political decision making."⁵⁴

Bruce Ryder has written at length about how the Canadian constitutional commitment to substantive equality intersects with the right of religious adherents to participate in public life as equal citizens.⁵⁵ Ryder explains:

⁵⁰ *Mouvement laïque québécois v Saguenay (City)*, para. 74.

⁵¹ See Kristopher Kinsinger, "Quebec's Bill 21 Misapplies Religious Neutrality Principle," *Policy Options*, 7 May 201. Available at: <https://bit.ly/3pT7JU8>.

⁵² Benjamin L. Berger, "Freedom of Religion," in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), 772.

⁵³ Berger, "Freedom of Religion," 772.

⁵⁴ Moon, "The Limits of State Neutrality," 501.

⁵⁵ Bruce Ryder, "The Canadian Conception of Equality Religious Citizenship," in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), 87.

[T]he Canadian conception of equal religious citizenship is not confined to a private or religious sphere of belief, worship and practice. Instead, a religious person's faith is understood as a fundamental aspect of his or her identity that pervades all aspects of life. . . . They have a right to participate equally in the various dimensions of public life without abandoning the beliefs and practices their faith requires them to observe. In contrast, some other liberal democracies are more likely to insist that citizens participate in public institutions on terms that conform to the state promotion of secularism. On this view, equal religious citizenship is confined to the private sphere, and must give way to the secular requirements of public citizenship.⁵⁶

The vision of religious neutrality I articulate here is inextricably linked to Ryder's conception of equal religious citizenship. Inclusive religious neutrality presumes that religion is no more or less immutable than the other grounds of discrimination. If we grant that religion is "constructively immutable," then it is just as impermissible for the state to discriminate against people because of their religious beliefs or identity as it is to discriminate based on immutable grounds such as race or gender.⁵⁷ Religious belief cannot be readily detached from a person's core identity, as proponents of Bill 21 seem to imagine.

In this way, inclusive religious neutrality prevents the state from arbitrating religious disputes, even where these debates have public implications. This principle is subject to the obvious caveat that the state will always have a vested interest in curbing or discouraging objectively harmful religious practices. But beyond this otherwise narrow exception, it is rarely appropriate for the state to act in a way that has the effect of promoting or stigmatizing certain religious beliefs or practices. As such, inclusive religious neutrality is reinforced by equality-enhancing values and a recognition that in favouring certain beliefs, the state would be suggesting that those who do not adhere to these beliefs are less deserving of public citizenship.

When viewed from an inclusive perspective, religious neutrality thus affirms that the state has not been endowed with any sort of "secularizing mission," but quite the opposite.⁵⁸ Secularism is built on assumptions about divinity, society and what it means to be human. In other words, secularism is functionally religious. This point may seem counterintuitive. However, religion, functionally defined, does not require faith in a higher deity or even the supernatural. As Leeman contends, "Any and every position that a person might adopt in the political sphere relies upon a certain conception of human beings, their rights and their obligations toward one

⁵⁶ Ryder, "The Canadian Conception," 88.

⁵⁷ See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para. 13.

⁵⁸ See *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, at para. 91.

another, creation and God.” In this sense, Leeman goes on to explain, religion “determines ... the worldview lens through which we come to hold our political commitments.”⁵⁹ Accordingly, everyone is, to some degree, religious.⁶⁰ This is why an inclusive approach to religious neutrality seeks to ensure that the state does not directly or indirectly support irreligious worldviews over religious ones. If irreligiosity is just another form of religion, then state support for irreligion will favour some religious adherents (namely secularists, atheists and agnostics) over others.

The contention that a religiously neutral state is still “gonna have to serve somebody” – to borrow Bob Dylan’s refrain – is one that even non-religious theorists have accepted.⁶¹ The late Ronald Dworkin, an avowed atheist, recognized as much in his contention that religion is “a deep, distinct, and comprehensive worldview ... [that] holds that inherent, objective value permeates everything, that the universe and its creatures are awe-inspiring, that human life has purpose and the universe order.”⁶² Based on this definition, atheists and secularists ought to recognize that “belief in a god is only one possible manifestation or consequence of that deeper worldview.”⁶³ As Dworkin contended, political disputes arise between theists and atheists because “they hate each other’s gods.”⁶⁴ Leeman uses a similar metaphor to describe religion’s role in public life. “If all of life is religious,” he explains, then “[t]he public square is nothing more or less than a battleground of gods, each vying to push the levers of power in its favour.” Consequently, Leeman concludes, “there are no truly secular states, only pluralistic ones.”⁶⁵

6. Conclusion

The principle of religious neutrality is, as I have sought to demonstrate here, a conceit. Yet this does not mean that the conceit lacks insight, even as debates over the meaning of secularism expose fundamental disagreements over what the state’s duty of religious neutrality entails. An inclusive vision of this duty holds that governments should refrain from adopting laws and policies that pursue ecclesiastical or explicitly theological objectives. This does not, however, confine religion to the private sphere – far from it. Religious neutrality ought not to remove religion from the realm of public policy (as many proponents of liberal secularism hold) but should instead recognize that the state is only one of numerous actors that occupy

⁵⁹ Leeman, *Political Church*, 81.

⁶⁰ See Iain T. Benson, “Seeing Through the Secular Illusion,” *NGTT* 54(4) (2013), 13-16.

⁶¹ Bob Dylan, *The Lyrics: 1961-2012* (New York: Simon and Schuster, 2016), 401.

⁶² Ronald Dworkin, *Religion Without God* (Cambridge: Harvard University Press, 2013), 1.

⁶³ Dworkin, *Religion without God*, 1, 4-5.

⁶⁴ Dworkin, *Religion without God*, 7, 8-9. See also Leeman’s analysis on this point in *Political Church*, 78.

⁶⁵ Leeman, *Political Church*, 82.

the public square. The state has no more jurisdiction to keep religious perspectives out of public life than it does to bar advocates of any other “nonreligious” cause. Bill 21 denies this reality by demanding that religious civil servants publicly convert to the state religion of *laïcité* – or at least give the appearance that they have done so – as a condition of their employment. Such a policy is inconsistent with the general trend of Canadian constitutional jurisprudence toward inclusive religious neutrality. Whether the Supreme Court will acknowledge this inconsistency remains to be seen.

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